Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DEFENDERS OF WILDLIFE ET AL.,
PETITIONERS
v.
WILLIAM T. HOGARTH,
ASSISTANT ADMINISTRATOR FOR FISHERIES,
US NATIONAL MARINE FISHERIES SERVICE, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Can a federal agency, by regulation, override the clear and explicit wording of a Congressional statute?

2) Are the provisions in a non-treaty international agreement the "supreme Law of the Land" pursuant to Article VI of the Constitution, and is such an agreement sufficient justification to disregard the "presentment clause" of Article I, Section 7, where a federal agency regulation repeals and amends Congressional legislation?

PARTIES TO THE PROCEEDING

The petitioners are Defenders of Wildlife, Earth Island Institute, The Humane Society of the United States, Environmental Solutions International, Animal Welfare Institute, International Wildlife Coalition, American Humane Association, Earthtrust, Greenpeace Foundation, Animal Fund, American Society for the Prevention of Cruelty to Animals, Sierra Club, Samuel LaBudde and Craig VanNote.

The respondents are William T. Hogarth, in his official capacity as Assistant Administrator for Fisheries and head of the National Marine Fisheries Service (NMFS), the Under Secretary and Administrator of the National Oceanic and Atmospheric Administration (NOAA), and the Secretary of Commerce.

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations, nor any publicly held companies owning 10% or more of the stock, of any party to this petition.

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IN THE

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No.

DEFENDERS OF WILDLIFE, ET AL., PETITIONERS

v.

WILLIAM T. HOGARTH, ASSISTANT ADMINISTRATOR FOR FISHERIES, U.S. NATIONAL MARINE FISHERIES SERVICE, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Defenders of Wildlife, and other groups and individuals, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The divided opinion of the U.S. Court of Appeals for the Federal Circuit, upholding respondents' administrative regulation that is contrary to the plain language of the statute,

is reported at 330 F.3d 1358 (Fed. Cir. 2003), and appears in the appendix to this petition ("Pet. App."), infra, at 1a-34a. This decision includes a dissent by Circuit Judge Newman. Pet. App. at 31a-34a The order of the Federal Circuit denying petitioners' motion for rehearing en banc, including Circuit Judge Gajarsa's dissenting opinion, is reported at 344 F.3d 1333, and appears at Pet. App. 55a-59a. The ruling of the U.S. Court of International Trade on the federal agency regulation in question is reported at 177 F.Supp.2d 1336 (CIT 2001), and the relevant portions of that decision appear at Pet. App. 35a-54a.

JURISDICTION

The judgment of the Court of Appeals was entered June 4, 2003. A petition for rehearing was denied on September 25, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory provision at issue, 16 U.S.C. § 1413(a)(2)(B)(v), is set forth in Pet. App. at 77a. The agency regulation at issue, 50 C.F.R. § 216.24(c)(6)(iii), is set in forth in Pet. App. at 105a-106a.

STATEMENT OF THE CASE

This case involves petitioners' challenge, under the Administrative Procedure Act, 5 U.S.C. §§ 701 - 706, of a final regulation promulgated by respondent federal agencies. The statutory provision in question, part of a new dolphin-safe tuna regime created by Congress in 1997, prohibits "sundown sets" upon dolphins by U.S. vessels. The

legislative provision at issue mandates: "Regulations issued under this section shall include provisions ... ensuring that the backdown procedure during sets of purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes *before* sundown." 16 U.S.C. § 1413 (a)(2)(B)(v) (emphasis added). Pet. App. at 77a. The challenged regulation, conversely, states "On every set encircling dolphin, the backdown procedure must be completed no later than one-half hour *after* sundown, except as provided here." 50 C.F.R. § 216.24(c)(6)(iii) (emphasis added). Pet. App. at 105a-106a. The "exception" further allows: "Should a set extend beyond one-half hour after sundown, the operator must use the required marine mammal release procedures including the use of the high intensity lighting system." Id. (emphasis added). These non-conforming regulatory provisions violate the plain terms of the statute.

The International Dolphin Conservation Program Act (IDCPA), P.L. 105-42 (111 Stat. 1122), was signed by the President in August 1997. The IDCPA amends the Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361 - 1421, and is set forth at Pet. App. 61a-91a. The sundown set prohibition was inserted by Congress in the IDCPA to halt the large number of dolphin deaths that occur through this practice. See Pet. App. at 212a-214a and 225a. The first stated purpose of the IDCPA is "to give effect to the Declaration of Panama, signed October 4, 1995 by the Governments of Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, the United States of America, Vanuatu, and Venezuela, including the establishment of the International Dolphin Conservation Program, relating to the protection of dolphins and other species ..." IDCPA, Section 2(a) in Pet. App. 61a-62a; 16 U.S.C. § 1361 (note). Significantly, the 1995 Panama Declaration possesses no language on sundown sets or their

timing. Pet. App. at 153a-161a.

The MMPA was originally enacted in 1972 in large part due to the huge numbers of dolphin casualties in the yellowfin tuna fishery of the eastern tropical Pacific Ocean, where mature schools of lucrative yellowfin tuna frequently swim immediately beneath pods of dolphins. Since that time, the MMPA has been amended several times – e.g., 1984, 1988, 1990, 1992 and 1997 – to address developments in the "tuna/dolphin" fishery of the eastern tropical Pacific Ocean. In the late 1980s, the U.S. tuna industry and the U.S. Congress created the dolphin-safe tuna program, which has helped ensure that the tuna consumers purchase and eat is truly protective of dolphins and other sea creatures.

In 1992, in an effort to expand the U.S. dolphin-safe program internationally, eleven countries, including the United States, entered into the LaJolla Agreement, which sought to institute dolphin mortality caps amongst the signatories. Pet. App. at 141a-151a. In 1995, the LaJolla signatories agreed to the Declaration of Panama. Pet. App. at 152a-161a. The first two stated goals of the Panama Declaration are: "(1) progressively reducing dolphin mortality in the eastern Pacific Ocean (EPO) fishery to levels approaching zero through the setting of annual limits and (2) with a goal of eliminating dolphin mortality in this fishery, seeking ecologically sound means of capturing large yellowfin tunas not in association with dolphins." Id. at 152a. Neither the LaJolla Agreement nor the Panama Declaration contain any language on dolphin sundown sets, or their timing.

In 1997, the Congress passed IDCPA, which repeated the Panama Declaration's "objective of progressively reducing dolphin mortality to a level approaching zero through the setting of annual limits and with the goal of eliminating dolphin mortality." 16 U.S.C. § 1361 (note). Pet. App. at 62a-63a. The IDCPA also sought "to eliminate the

ban on imports of tuna from those nations that are in compliance with the International Dolphin Conservation Program." ("IDCP"). Id. at 62a.[1] Crucially, the International Dolphin Conservation Program (IDCP) is specifically defined in the 1997 statute as the international dolphin program established by the 1992 LaJolla Agreement "as formalized, modified, and enhanced in accordance with the Declaration of Panama." Pet. App. at 63a; 16 U.S.C. § 1362(28). In addition, the IDCPA amended the standards by which the dolphin-safe tuna label would be certified. Pet. App. at 67a; 16 U.S.C. § 1385(d). See generally Brower v. Evans, 257 F.3d 1058 (9th Cir. 2001) (holding that the Department of Commerce's changes to the dolphin-safe label definition to be illegal under the IDCPA).

In the time between the 1997 IDCPA and the non-conforming regulations, another (and the third) international agreement was reached on the IDCP in 1998. Pet. App. at 162a-211a. In this agreement's annex is a sundown set provision that reads: "Complete backdown no later than thirty minutes after sunset, as determined by an accurate and reliable source approved by the Parties." Pet. App. at 207a. Like the previous two international agreements, the 1998 agreement has never been ratified as a treaty pursuant to Article II, Section 2 of the Constitution.[2] See also Article VI,

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[1] The U.S. Court of International Trade possessed jurisdiction over this case pursuant to 28 U.S.C. § 1581(i)(3)-(4).

[2] All three agreements are also not "self-executing." An international agreement is "non-self executing" if the agreement "manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation." Rest. (Third) Foreign Relations Law § 111(4)(a). See also Foster v. Neilson, 27 U.S. 253, 314 (1828). Article VII of the 1998 agreement, for example, explicitly envisions that each party will "adopt, in accordance with its laws and procedures, the necessary measures to ensure the implementation

Clause 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.") (emphasis added).

After a proposed rule and accompanying public comments, respondents published a final rule in early 2000 to implement the 1997 IDCPA. 65 Fed. Reg. 30 (January 3, 2000). Pet. App. at 92a-140a. Both the proposed rule, 64 Fed. Reg. 31806 (June 14, 1999), and the final rule possessed sundown set language challenged by petitioners from the start of the administrative process. The U.S. Marine Mammal Commission, an independent federal agency created by Congress to offer expert scientific and legal advice on marine mammal conservation, 16 U.S.C. §§ 1401-1407, agreed that the statute's meaning on sundown sets was clear and that only Congress could make the change desired by respondents. In the final rule, in response to comments questioning the legality of the sundown set regulation, respondents explained:

> NMFS disagrees since the previous regulations, previous amendments to the MMPA, the LaJolla Agreement[3] and the IDCP all specify that backdown

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of and compliance with this Agreement." Pet. App. at 169a. International agreements and Treaties on subjects that Congress has regulated extensively (such as the dolphin-safe tuna program) are also more likely to be interpreted as non-self executing. See, e.g., Robertson v. General Electric Co., 32 F.2d 495 (4th Cir. 1929), cert. denied, 280 U.S. 571 (1929).

[3] To the contrary, the LaJolla Agreement does not specify that backdown procedures must be completed one-half hour after sundown. In fact, this international agreement does not even mention sundown sets or their timing. Pet. App. at 141a-151.

> procedures must be completed no later than one-half hour after sundown. Furthermore, under the Agreement on the IDCP, signatory nations agreed that the backdown procedure must be completed no later than one-half hour after sundown. Since no congressional reports or colloquy indicated that this "revision" was adopted purposefully, NMFS concludes the language in the IDCPA stating that backdown procedures must be completed no later than one-half hour before sundown must have been a drafting error.

Response To Comment 81. Pet. App. at 93a.

But as even the Federal Circuit majority conceded, "It is not clear from the face of the IDCPA, however, that word 'before' is a drafting error." Pet. App. at 15a. "The IDCPA clearly requires that the backdown procedure be completed one-half hour before sunset." Id. at 16a. Yet, citing 16 U.S.C. § 1413 (a)(2)(C), another provision in the 1997 IDCPA that allows "adjustments" to requirements pertaining to "fishing practices" as may be "appropriate," as well as the 1998 non-treaty international agreement, the Federal Circuit majority nevertheless concluded it would "not disturb the decision of the Court of International Trade that the Interim-Final Rule's Sunset Rule does not conflict with the IDCPA." Pet. App. at 16a-18a. Because the sundown set regulations "directly contradict the provisions of the statute that authorizes them," Circuit Judge Newman dissented, arguing that the decision "is not only a violation of administrative law, but an incorrect statutory interpretation." Pet. App. at 31a.[4]

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[4] Circuit Judge Newman also dissented in Asgrow Seed Co. v. Winterboer, 989 F.2d 478, 479 (Fed. Cir. 1993) (en banc rehearing petition denied), stating the majority panel "reached an interpretation of

On the petition for rehearing en banc, Circuit Judge Gajarsa also dissented. Both he and Judge Newman concluded that "(d)espite the panel's unanimous agreement on meaning, the majority allows the Secretary to abrogate the section by regulation. The supremacy of administrative over legislative authority is a concept foreign to our structure of government. The panel majority's construction of the IDCPA authorizing such an abrogation is therefore unconstitutional and should be so declared." Pet App. at 57a. Both judges further stated, "Much as Congress is forbidden to amend the Constitution with ordinary legislation, an executive agency may not amend legislation with regulation" and the divided majority decision "permits a new form of uneasy and illegitimate partnership between Congress and executive agencies that has previously been rejected by the United States Supreme Court." Id. at 59a.

Despite the fact that the statutory sundown set provision is consistent with the purposes of the 1997 IDCPA, despite the fact that the federal agency NMFS openly admits it has changed the statutory mandate through a rationale it revealed for the first time in this litigation, and despite the several serious Constitutional problems raised by the federal agencies' dismissal of the statute, respondents continue to claim that the statutory provision is a "drafting error."[5] Response of Defendants-Appellees, William T. Hogarth, et al., to Plaintiffs-Appellants' Petition for Rehearing En Banc

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this provision that is contrary to the statute and its purpose." This Court later reversed the Federal Circuit decision on exactly such statutory construction grounds. Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995).

[5] But Congress has not passed a fairly common "technical corrections act" as a result. See, e.g., P.L. 107-273 (116 Stat. 1758), Title IV, Antitrust Technical Corrections Act of 2002; P.L. 106-176 (114 Stat. 23), Omnibus Parks Technical Corrections Act of 2000.

("En Banc Response") before the U.S. Court of Appeals for the Federal Circuit (August 7, 2003) at 12.

The impacts to dolphins as a result of this unwarranted change by NMFS are severe. See, e.g., Pet. Appendix K (Report by U.S. National Academy of Science's National Research Council). See also Pet. App. J. Almost all dolphins in the eastern tropical Pacific Ocean, a water area roughly the size of the continental United States, travel in pods or herds ranging from several to over one-thousand individuals. Intelligent creatures, dolphins possess a distinct social structure within the pods, including important mother-calf bonds. Just one fishing set on dolphins, to catch the lucrative yellowfin tuna that swim directly below, can seriously injure and kill an entire community of 500-2000 dolphins. These sets, known as "disaster sets," seriously harm dolphin populations in the ETP, with three dolphin stocks officially declared "depleted" under the MMPA.[6]

Because of the visibility problems posed by the glaring sunset on the ocean, followed quickly by darkness[7], many sundown sets become disaster sets. The administrative record in this case unequivocally reveals that dolphin deaths (and serious injuries) markedly increase with sundown sets. Thus, the three populations of legally depleted dolphins in the ETP are biologically imperilled in large part due to sundown disaster sets. This is precisely why Congress

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[6] See generally 16 U.S.C. § 1361 (1) - (6) (purposes of the MMPA are to conserve and protect marine mammals, especially those biologically and legally "depleted").

[7] After backdown procedures are completed, there is still a lot of work to do. The fishing nets must be emptied and any remaining unobserved dolphins must be released. The nets must be brailed and brought onto the decks of the vessels. This reality further reinforces Congress' rationale for the backdown procedure to be completed well before sundown.

drafted 16 U.S.C. § 1413(a)(2)(B)(v): to avoid sundown sets altogether. Under the our system of government, the executive branch simply may not unilaterally legislate different results.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL AGENCIES AND THE FEDERAL CIRCUIT DISREGARDED THE CLEAR LANGUAGE OF THE STATUTE.

The decision of the Court of Appeals below is extraordinary. It allows a federal agency, NMFS, to promulgate a regulation that disregards the mandate of a Congressional statute. If permitted to stand, the Federal Circuit decision would allow the Executive branch to ignore clearly worded statutes on a wide range of issues: environmental protection, financial regulation, consumer safety, energy production, and gun control. There exist few areas where executive regulation could not now trump Congressional legislation.

A. The Federal Circuit Construed the Statute in a Way that Conflicts with All Relevant Decisions of this Court.

In determining whether an agency's interpretation of a clear statutory provision is legal, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) sets out the now well-accepted test. Where "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." Id. at 842-43 (emphasis added). Determining Congress' intent "begins with the language of the statute ... (a)nd where the statutory language

provides a clear answer, it ends there as well." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999)(citations omitted). See also Regions Hospital v. Shalala, 522 U.S. 448, 457 (1998) (if traditional tools of statutory construction reveal Congress' intent is clear, that is the end of the matter); Garcia v. United States, 469 U.S. 70, 75 (1984)(requiring "the most extraordinary showing of contrary intentions" to disregard the plain meaning of a statutory provision).

In the case at hand, the statutory language in 16 U.S.C. § 1413(a)(2)(B)(v) could not be plainer. Agency regulations shall ensure "that the backdown procedure during sets of purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes before sundown." Id. No contemporaneous legislative history exists on the provision to call the clear language of this provision into question.[8]

The only remotely plausible justification for the Federal Circuit's departure from Congress' crystal clear direction on sundown sets is 16 U.S.C. § 1413(a)(2)(C). This provision states: "The Secretary may make such adjustments as may be appropriate to requirements of subparagraph (B) that pertain to fishing gear, vessel equipment and fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program."[9] (emphasis added). Thus, the ultimate issue here

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[8] The sundown set provision signed into law by the President was adopted on the Senate floor and then later accepted by the House for final passage.

[9] Just because the 1998 international agreement took the "IDCP" moniker does not mean that Congress' specific legislative dictates no longer matter. The 1997 IDCPA itself defines the "International Dolphin Conservation Program" as "the international program established by the agreement in LaJolla, California, in June 1992, as formalized, modified and enhanced in accordance with the Declaration of Panama." 16 U.S.C.

is whether the NMFS' regulatory change from "before" to "after" – a difference as stark as "go and "stop" – is "appropriate" in this or any circumstance.

When interpreting two potentially conflicting statutory provisions, this Court has consistently attempted to read the provisions together. "It is an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." Colautti v. Franklin, 439 U.S. 379, 392 (1979), citing United States v. Menasche, 348 U.S. 528, 538-39 (1955)(one provision should not be interpreted so as to "destroy" another). In other words, the "general statutory provision in the latter section cannot trump the clear language of the more specific (provision)." Dep't of Housing and Urban Development v. Rucker, 535 U.S. 125, 134 (n.5)(2002). See also TRW, Inc. v. Andrews, 534 U.S. 19, 23 (2001) ("We are not at liberty to make Congress' explicit exception the general rule as well.").

Thus, NMFS can no more authorize sundown sets one-half hour after sundown than it can allow "the use of explosive devices in all purse seine operations." 16 U.S.C. § 1413 (a)(2)(B)(vi). Yet, under the majority's rationale, NMFS could lawfully allow bombs to drop on dolphins. In fact, none of the supposedly mandatory provisions in subsection (a)(2)(B) would survive the grand interpretation now given subsection (a)(2)(C). Such a result cannot be acceptable. This Court has always sought to give effect to "every clause and word of (the) statute." Negonsott v. Samuels, 507 U.S. 99, 106 (1993), quoting Moskal v United States, 498 U.S. 103, 109-110 (1990). "Statutes must be interpreted, if possible, to give each word some operative effect." Walters v. Metropolitan Educ. Enterprises, Inc., 519 U.S. 202, 209 (1997)(citations omitted). "Speculation loses,

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§ 1362(28). Again, no international agreement before the 1997 IDCPA addresses sundown sets.

for the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight." Food & Commercial Workers v. Brown Group, 537 U.S. 544, 550 (1996). Numerous other Supreme Court decisions confirm this "cardinal principle of statutory construction." Duncan v. Walker, 533 U.S. 167, 174 (2001).[10]

The decisions of this Court consistently "express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." Pennsylvania Public Welfare Dep't v. Davenport, 495 U.S. 552, 562 (1990), citing Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 837 (1988). Accordingly, in Green v. Bock Laundry Machine Co., 490 U.S. 504, 524 (1989), the Court ruled, in the context of a product liability action, that the specific impeachment provisions of Rule 609 of the Federal Rules of Evidence prevailed over the more general Rule 403 pertaining to the exclusion of certain relevant evidence. In support of this interpretation, Green cited D. Ginsburg & Sons, Inc. v. Popkin, 285 U.S. 204 (1932), which held that a specific provision in a bankruptcy statute took precedence over a more general provision in the same statute. "General language of a statutory provision, although broad enough to include it, will not be held to apply

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[10] "It is well settled that 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Id., quoting Bates v. United States, 522 U.S. 23, 29-30 (1997) and Rusello v. United States, 464 U.S. 16, 23 (1983); Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687, 698 (1995) ("reluctance to treat statutory terms as surplusage"); Menasche, supra, at 538-39 ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)).

to a matter specifically dealt with in another part of the same enactment." Id. at 208.[11]

Similarly, repeated decisions of this Court support the proposition that the general should not destroy the specific. For example, in HCSC-Laundry v. United States, 450 U.S. 1 (1981), this Court held that a specific provision of the Internal Revenue Code relating to hospitals – not the more general section on charitable organizations – governed eligibility for tax-exempt status of a non-profit laundry service for hospitals:

> "(S)ubsection (e) is also a part of § 501. And it expressly concerns the tax status of a cooperative hospital service organization ... it is a basic principle of statutory construction that a specific statute, here subsection (e), controls over a general provision such as subsection (c)(3), particularly when the two are interrelated and closely positioned, both in fact being parts of § 501 relating to exemption of organizations from tax."

Id. at 5-6. As the per curiam decision noted, "The Congress easily can change the statute whenever it is so inclined." Id.

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[11] See also Missouri v. Ross, 299 U.S. 72, 76 (1936) (state creditor held bound by specific provision of Congress pertaining to owed taxes, despite general provision giving state law effect over city creditor); MacEvoy v. United States, 322 U.S. 102, 106-108 (1944) (specific statutory provision prevents remote subcontractor from possessing right of action upon federal contractor's bond, despite general provision that allowed "every person" to sue); Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961) (interest due by U.S. on overpayment of taxes governed by specific "carrybacks," not general overpayment provision); Morton v. Mancarai, 417 U.S. 535, 549 (1974) ("repeals by implication not favored").

at 8.[12]

B. The Federal Circuit Decision Raises Serious Constitutional Problems Relating to Separation of Powers.

Equally disturbing are the Constitutional ramifications of the holding below. Although Article I, Section 1 of the Constitution grants "all legislative Powers" to Congress, here it was the executive agency NMFS, *not Congress*, that literally amended the 1997 IDCPA by changing "30 minutes before sundown" to "one-half hour after sundown." This major "legislative" change by NMFS, whatever its origins and benefits, clearly countermands "the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." INS v. Chadha, 462 U.S. 919, 951 (1983). "So, also, from the beginning of the Government, the *Congress has conferred upon executive officers the power to make regulations* ... Such regulations become, indeed, binding rules of conduct, but they are valid only as *subordinate rules* and when found to be within the framework of the policy which the legislature has sufficiently defined." Panama Refining Co v. Ryan, 293 U.S. 388, 428-29 (1935) (emphases added). In fact, when the Department of Commerce was created by Congress, it was "vested with jurisdiction and control of the departments, bureaus, offices, and branches of the public service hereinafter specified, and with such other powers and duties as may be prescribed by law." 32 Stat. 825 (1903)

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[12] Indeed, the executive here has recommended legislation several times since the 1997 IDCPA that would change the statutory provision on sundown sets to match the non-conforming regulation, but Congress has repeatedly declined the invitation.

(emphasis added). See also 37 Stat. 736 (1913).

To be clear, petitioners are well aware of the long line of precedent supporting Congressional delegation of legislative power where, inter alia, Congress establishes "by legislative act an intelligible principle to which the person or body authorized to (act) is directed to conform." J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). Congress also "cannot delegate any part of its legislative plower except under the limitation of a prescribed standard." United States v. Chicago, M., St. P. & P.R. Co., 282 U.S. 311, 324 (1931). See also National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943) (upholding delegation of authority to Federal Communications Commission to regulate broadcast licensing according to "public interest, convenience, or necessity").

Here, however, Congress did not delegate the legislative power to amend and repeal the explicit sundown set timing command. 16 U.S.C. § 1413 (a)(2)(C). Rather, Congress merely gave NMFS the authority to "make such adjustments as appropriate" to the "requirements"[13] in subparagraph (a)(2)(B). There are any number of potential applications – such as increasing the number of observers required on each vessel or allowing the use of a safety procedure "more effective" than the "backdown procedure" – that petitioners would not and could not object to if respondent agencies were to propose them via regulation. See generally 16 U.S.C. § 1413 (a)(2)(B)(i) - (xii). But respondent agencies cannot, under the present circumstances, read the sundown set command of "no later than 30 minutes before sundown" out of existence. Id. at (v). See also, e.g., id. at (vi) ("banning the use of explosive devices in all purse

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[13] Note that unlike some of the regulatory "requirements" in 16 U.S.C. § 1413 (a)(2)(B), subsection (v) pertaining to sundown sets must be "ensur(ed)." 16 U.S.C. § 1413 (a)(2)(B)(v).

seine operations").

Further, until this litigation commenced, respondents never referred to 16 U.S.C. § 1413 (a)(2)(C), in either the Federal Register or the full administrative record, as a justification for overturning the Congressional sundown set timing mandate. This, too, violates established precedent of this Court against post hoc rationalizations, but the Federal Circuit allowed it. Pet. App. at 17a-18a. See, e.g., S.E.C. v. Chenery, 318 U.S. 80 (1943); Motor Vehicle Manufacturers Assoc. v. State Farm, 463 U.S. 29 (1983). Respondent agencies never articulated precisely how, in the context of the IDCPA or the MMPA, the sundown set timing command is a "fishing practice" that contributes to advancing dolphin conservation or the Panama Declaration. The only other reference to "fishing practices" in the MMPA is found at 16 U.S.C. § 1386 (d)(1)(D), where term is used "to reduce the incidental mortality and serious injury of marine mammals in commercial fishing operations." Id. (emphasis added). But, here, the NMFS' post hoc rationalization would serve only to increase dolphin mortality in a way squarely at odds with the IDCPA objective of "progressively reducing dolphin mortality to a level approaching zero through the setting of annual limits and with the goal of eliminating dolphin mortality." Pet. App. at 62a-63a; P.L. 105-42 at Section 2(b)(4); 16 U.S.C. § 1361 (note).

If one accepts the rationale of the Federal Circuit, the manner in which NMFS changed the Congressional sundown set standard also violated the presentment clause in Article I, Section 7 of the Constitution. Similar to Clinton v. New York, 524 U.S. 417 (1998), where this Court found that the President does not possess authority under the 1996 Line Item Veto Act to cancel portions of duly enacted laws before his signature, NMFS simply cannot change a legislative command it finds inconvenient after the President has signed the bill into law. In this instance, once the President signed

the 1997 IDCPA containing the precise sundown set timing limits, only Congress could change the standard.[14] "Amendment and repeal of statutes, no less than enactment, must conform with Art. I." Chadha at 954.

As it was in both Clinton and Chadha, Field v. Clark, 143 U.S. 649 (1892) is an important precedent in analyzing this petition. This is so for two reasons. First, as will be discussed in more detail, infra, the "constitutionality of congressional-executive agreements appears to have been first raised before the Supreme Court" in Field. Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate* (1993) at 55.[15] Second, in upholding the constitutionality of the 1890 Tariff Act, the Court found that the President was executing, not making, law when he was authorized to suspend import duty exemptions from any country that itself imposed import duties "reciprocally unequal and unreasonable." Field at 693. As Justice Harlan explained:

> Legislative power was exercised when congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the act of congress. It was not the making of law.

Id.

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[14] "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." Panama Refining Co., supra, at 421.

[15] Petitioners do not seek to invalidate the 1998 international agreement, but merely wish to have the un-conforming sundown set regulation struck down as it relates to U.S. vessels setting nets on dolphins to catch yellowfin tuna below.

Unlike Field, however, respondent federal agencies did unabashedly make federal law when they repealed the Congressional sundown set timing command. In Field, "(n)othing involving the expediency or the just operation of such legislation was left to the determination of the (executive)." Id. at 693. But, here, the Executive branch unilaterally and expressly determined that its completely different sundown set language was more "appropriate" than the specific standard created by Congress. In Field, the executive had a "duty" to act in order to "execute" a "policy that Congress had embodied in the statute" based on "a condition that did not exist when the Tariff Act was passed." Clinton at 443-444. To the contrary, here, the IDCPA expressly stated discretionary "adjustments" to the regulations could occur "as may be appropriate." 16 U.S.C. § 1413(a)(2)(C) (emphasis added).[16] Not only did respondent agencies choose to override the statute, they did so without any transparent consideration of how their construction would undermine the purposes of the IDCPA, such as recovering depleted marine mammal stocks and progressively reducing dolphin mortality in the EPO fishery "to a level approaching zero." 16 U.S.C. § 1361 (note). And unlike Field, which involved foreign trade matters, where the President possesses some Constitutional authority under Article II, the statute at issue pertains only to "vessels of the United States." Pet. App. 76a-77a; 16 U.S.C. § 1413 (a)(2)(A). The statutory provision in question here, in other words, does not seek to regulate foreign entities such as in

[16] In addition, when Congress instructed the State Department to seek an international agreement, it did so without any reference to weakening or otherwise changing the sundown set timing provision. 16 U.S.C. § 1412.

Field.[17]

Thus, this Court has never allowed an agency regulation, under any context, to trump the express will of Congress. And this Court has only allowed delegation of Congressional legislative authority under certain circumscribed conditions and procedures, none of which have been met in this case. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be lawmaker." Youngstown Sheet & Tube Co v. Sawyer, 343 U.S. 579, 587 (1952). "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." Field at 692.

II. THE FEDERAL CIRCUIT HAS DECIDED AN IMPORTANT QUESTION ON THE LEGISLATIVE AUTHORITY OF NON-TREATY INTERNATIONAL AGREEMENTS THAT HAS NOT BEEN, BUT NOW SHOULD BE, SETTLED BY THIS COURT.

A. The Federal Circuit Decision Raises Compelling Constitutional and Statutory Construction Questions of Wide Relevance.

There is no end to the regulatory mischief the Federal Circuit precedent, if allowed to stand, could cause. Renegade federal agencies could now regularly ignore

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[17] In relations with foreign countries, the President possesses "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

Congressional law so long as a non-treaty international agreement supports the agency regulation in question. The Federal Circuit majority opinion takes this position. Pet. App. at 18a ("NMFS relied on the International Agreement creating the IDCP as support for the Interim-Final Rule and relied on the fact that the Interim-Final Rule is consistent with the International Agreement" ... NMFS already exercised its discretion to draft the Interim-Final rule consistently with the IDCP"). Respondents go one step further when they declare, "(T)he statute explicitly grants Commerce specific authority to make adjustments to subparagraph (B) to bring United States regulations into compliance with international standards." En Banc Response at 4 (emphasis added).

Both the Federal Circuit divided majority decision and respondents expressly link what is "appropriate" regulation under the IDCPA, 16 U.S.C. § 1413 (a)(2)(C), with a subsequent non-treaty international agreement, even as it relates to U.S. vessels directly under the jurisdiction and long-standing oversight of Congress. NMFS relied upon this non-treaty international agreement as support for its final regulation on sundown sets as it simultaneously argued that the Congressional provision "must have been a drafting error" and that "previous" (i.e., pre-1997 IDCPA) regulations and statutory provisions possessed different language on sundown sets. Pet. App. at 93a (Response to Comment 81). The Federal Circuit correctly rejected the latter two excuses to alter Congressional requirements, and petitioners now ask this Court to reject the remaining explanation pertaining to the non-treaty international agreement, consistent with Justice Jackson's concurrence in Youngstown Sheet, supra:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his

> own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.
> Id. at 637-38.[18]

The federal agency NMFS cannot rightfully claim any constitutional basis for its regulation on sundown sets. It ignored the three pillars of the IDCP – the LaJolla Agreement, the Panama Declaration and the International Dolphin Conservation Program Act of 1997 – and chose to issue a regulation at odds with its own legislative authority. If NMFS is not reigned in with regard to its statutory construction of this issue, the Executive branch will be given a green light to treat non-treaty international agreements of any type as the "supreme Law of the Land" pursuant to Article VI, clause 2 of the Constitution. See also *Exercise of the International Agreement Power*, 11 For. Aff. Man. § 721.2 (U.S. State Department's well-established policy distinguishing between "treaties" and "international agreements other than treaties"). In the process of allowing non-treaty international agreements to serve this legislative role, the presentment clause of Article I, Section 7 would also be violated.

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[18] Here, however, it was a mid-level official at the State Department who signed the relied-upon 1998 agreement, not the President with his Article II powers and authorities.

B. The Federal Circuit Decision Conflicts with Court Decisions in the Fourth and Tenth Circuits on the Legal Status of Non-Treaty International Agreements.

Other federal courts have taken a position directly contrary to the Federal Circuit on conflicts between Congressional statutes and international agreements that are not treaties. In United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955), the Court of Appeals refused to give effect to provisions in a non-treaty international agreement with Canada on potato trade that conflicted with an agricultural act of Congress. As the Fourth Circuit stated:

> We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering such an agreement avoid complying with a regulation prescribed by Congress. Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The executive may not bypass congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports. Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is the latter which must be accepted as the expression of national policy.

Id., 204 F.2d at 659-660.[19] This Court granted certiorari in Capps "to determine whether the significant constitutional and statutory questions discussed by the Court of Appeals were necessary for the decision of the case." Id., 348 U.S. at 301. Writing for a unanimous Court, Justice Burton determined that the case could be decided on factual grounds established by the district court without reaching the significant Constitutional issues raised by non-treaty international agreements. Id. at 305.

A district court in the Tenth Circuit also considered a conflict between a Congressional statutory provision and a non-treaty international agreement in Swearingen v. United States, 565 F.Supp. 1019 (D. Colo. 1983). There, the court noted that it was "well aware of the caution that constitutional questions should be considered only when absolutely necessary in the determination of the dispute presented by the parties." Id. at 1022. But, nonetheless, it held that the plaintiffs could not recover a refund on income tax paid while working for the Panama Canal Commission, an agency of the U.S. Government, because the non-treaty international agreement provision purportedly authorizing such a refund was void as conflicting with the relevant Congressional section of the internal revenue code. Such international agreements, the court pointed out, "do not supersede prior inconsistent acts of Congress because, unlike treaties, they are not the 'supreme Law of the Land'." Id. at

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[19] The sundown set provision at issue, which only covers U.S. vessels by definition, must also be viewed in the context of Congress' exercise of its Constitutional commerce clause powers in Article I, Section 8 with regard to the entire U.S. dolphin-safe tuna program. See, e.g., 16 U.S.C. § 1371(a)(2)(B) (Moratorium on taking and importing marine mammals and marine mammal products). As differentiated by a case such as Japan Whaling Assoc. v. American Cetacean Society, 478 U.S. 221 (1986), Congress granted no discretion with regard to sundown set timing.

1021, quoting U.S. Const. Art. VI, cl.2; and citing Capps, supra; Rest. of the Law, 2d, Foreign Relations Law of the United States, § 144(1) (1965); Nowak, Rotunda, and Young, Constitutional Law at p. 189-90 (West 1978). Accord Seery v. United States, 130 Ct. Cl. 481 (1955) (authorizing taking suit regarding property in Austria against U.S. Government despite executive agreement limiting such claims); Metropolitan Petroleum Corp. v. United States, 31 Cust. Ct. 71 (1953) (Executive not authorized to apply duties in excess of Congressional limits).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 23, 2003

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 02-1224

DEFENDERS OF WILDLIFE, EARTH ISLAND INSTITUTE, THE HUMANE SOCIETY OF THE UNITED STATES, ENVIRONMENTAL SOLUTIONS INTERNATIONAL, ANIMAL WELFARE INSTITUTE, INTERNATIONAL WILDLIFE COALITION, AMERICAN HUMANE ASSOCIATION, EARTHTRUST, GREENPEACE FOUNDATION, ANIMAL FUND, AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, SIERRA CLUB, SAMUEL LABUDDE, and CRAIG VAN NOTE, Plaintiffs-Appellants, and FUND FOR ANIMALS and DAVID BROWER, Plaintiffs,

v.

WILLIAM T. HOGARTH, as Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, DONALD L. EVANS, Secretary of Commerce, UNDER SECRETARY OF COMMERCE, Administrator of the National Oceanic and Atmospheric Administration, ASSISTANT SECRETARY, National Oceanic and Atmospheric Administration, SECRETARY OF STATE, SECRETARY OF THE TREASURY, and

COMMISSIONER OF THE UNITED STATES CUSTOMS SERVICE, Defendants-Appellees.

Appeals from the United States
Court of International Trade

Filed : June 4, 2003

Before LOURIE NEWMAN, and SCHALL, Circuit Judges.

Opinion for the court filed by Circuit Judge SCHALL. Opinion concurring in part and dissenting in part filed by Circuit Judge NEWMAN.

Defenders of Wildlife, various other non-governmental organizations, and several **[*1360]** individuals filed suit in the United States **[**2]** Court of International Trade challenging three administrative determinations made by the Assistant Administrator for Fisheries of the National Marine Fisheries Service ("NMFS"). NMFS is part of the National Oceanic and Atmospheric Administration ("NOAA"), which is a component of the United States Department of Commerce ("Commerce"). Plaintiffs[1] n1 asserted (1) that NMFS's Interim-Final Rule on the taking of dolphins from depleted stocks in the Eastern Tropical Pacific Ocean ("ETP") using the purse seine method of fishing violates the International Dolphin Conservation Program Act ("IDCPA") and therefore is not in accordance with law; (2) that the environmental assessment prepared by NMFS violated the *National Environmental Policy Act* ("NEPA") and applicable regulations and that NMFS should have completed an

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[1] We refer to plaintiffs-appellants as "Plaintiffs."

environmental impact statement for the tuna/dolphin program under review; and (3) that the affirmative findings of Commerce that lifted the United States' tuna embargo against Mexico violated the IDCPA.[2] As relief, Plaintiffs sought a declaratory judgment that the government violated the IDCPA and NEPA through its administrative determinations, a remand to Commerce with instructions[3] **[**3]** to issue a revised proposed rule, and an order to Commerce to complete an environmental impact statement on the tuna/dolphin program.

On December 7, 2001, the Court of International Trade denied Plaintiffs' motion for summary judgment on the administrative record and entered judgment in favor of the government. *Defenders of Wildlife v. Hogarth, 177 F. Supp. 2d 1336 (Ct. Int'l Trade 2001)*. The court held that the Interim-Final Rule was in accordance with the IDCPA and that Commerce had not violated NEPA. *Id. at 1367.* Plaintiffs now **[**4]** appeal. n3 We affirm.

BACKGROUND

I. The ETP and Purse Seine Fishing

The ETP is a seven million square mile stretch of ocean that runs from the coast of California to the coast of Peru. It

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[2] The Secretary of Commerce delegated to the Assistant Administrator for Fisheries authority to make the administrative determinations at issue. The Secretary of State, Secretary of Treasury, and Commissioner of the United States Customs Service were named parties to the suit due to their potential involvement with the environmental assessment and their involvement with the Mexican embargo.

[3] Plaintiffs do not appeal the lifting of the embargo against Mexico.

is host to numerous species of wildlife, including yellowfin tuna and dolphins. One quarter of the world's tuna catch occurs in the ETP; of all the tuna caught in the ETP, yellowfin tuna is the most economically significant species.

A unique synergy exists in the ETP between schools of yellowfin tuna and groups of dolphins. Yellowfin tuna inexplicably aggregate in large numbers beneath dolphin schools. Fishermen, seeking to exploit this synergy, devised a method of catching yellowfin tuna called purse seine fishing. Purse seine fishing is based on the principle that dolphins must break the surface of the water to breathe every several minutes, allowing fishermen to easily identify and locate groups of dolphins. Once a large dolphin group is located, fishermen **[**5]** use motorboats, explosives, and helicopters to chase the dolphins **[*1361]** for extended periods in an attempt to exhaust them.

Eventually, the group is herded into a small area, where the fishermen first surround the dolphins and the submerged yellowfin tuna with an immense fishing net, called a purse seine, and then draw the bottom of the net together to trap the tuna. The fishermen then haul the net on board to recover the tuna. Dolphins are released through a "backdown" procedure, which takes place when the fishermen reverse the vessel's direction after approximately one-half of the purse seine net has been rolled onboard. Purse seine fishing results in the drowning deaths of dolphins that become entangled in the net. From 1959 to 1972, millions of dolphins were killed in this manner, and public outcry prompted Congress to pass legislation banning purse seine fishing.

II. Statutes and International Agreements

In 1972, Congress passed the Marine Mammal Protection Act ("MMPA"). The MMPA required that all marine

mammal populations be managed to maintain their "optimum sustainable population." Marine Mammal Protection Act, Pub. L. No. 92-522, 86 Stat. 1027 (1972) (codified as amended at **[**6]** *16 U.S.C. § 1361*). The MMPA created "a moratorium on the taking and importation of marine mammals . . .," except that marine mammals were permitted to be taken "incidentally in the course of commercial fishing operations" and permits allowing such incidental taking could be issued pursuant to the provisions of the MMPA. Id. at 1029-30 (codified at *16 U.S.C. § 1371(a)*). However, no permit could be issued for the taking of any marine mammal which had been designated by the Secretary as "depleted." Id. at 1031 (codified at *16 U.S.C. § 1371(a)(3)(B)*). The MMPA further directed the Secretary of the Treasury to "ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of the United States standards." Id. at 1030 (codified at *16 U.S.C. § 1371(a)(2)*). Upon conducting research required by the MMPA, the NMFS concluded that three dolphin stocks were depleted in the ETP: the coastal dolphin, the northeastern offshore spotted dolphin, and **[**7]** the eastern spinner dolphin. Regulation Governing the Taking and Importing of Marine Mammals, *42 Fed. Reg. 64,548-60 (1977)*; Taking and Importing of Marine Mammals; Listing of the Northeastern Offshore Spotted Dolphin as Depleted, *58 Fed. Reg. 58,285 (1993)*; Taking and Importing of Marine Mammals; Listing of the Eastern Spinner Dolphin as Depleted, *58 Fed. Reg. 45,976, 46,006 (1993)*.

In 1988, Congress enacted the MMPA Amendments of 1988, Pub. L. No. 100-711, 102 Stat. 4755 (1988). The amendments specified criteria for allowing access to the United States market by tuna-harvesting nations and imposed embargoes on tuna imports from countries,

including Mexico, that failed to meet those criteria. Id. Thereafter, in 1990, Congress enacted the Dolphin Protection Consumer Information Act, Pub. L. No. 101-627, § 901, 104 Stat. 4436, 4465 (1990), which established "dolphin safe" labeling standards and made it a violation of the *Federal Trade Commission Act* to label a product as "dolphin safe" if it contained (1) tuna harvested on the high seas by a vessel engaging in drift net fishing or (2) tuna harvested in the ETP by a vessel using the purse seine method, **[**8]** unless the tuna product was accompanied **[*1362]** by various statements demonstrating that no dolphins were intentionally encircled during the trip in which the tuna was caught. Id. § 901(d), 104 Stat. at 4466.

In 1992, the United States entered into a non-binding international agreement ("La Jolla Agreement"), which negotiated the creation of the International Dolphin Conservation Program ("IDCP"). The La Jolla Agreement stated that its objectives were to "progressively reduce dolphin mortality in the eastern Pacific Ocean . . . fishery to levels approaching zero through the setting of annual limits and . . . with a goal of eliminating dolphin mortality in this fishery . . . . " La Jolla Agreement, Apr. 23, 1992, Appendix 10

In 1995, the United States and eleven other countries signed the Panama Declaration, which formalized the La Jolla Agreement into a binding agreement. The purpose of the Panama Declaration was to strengthen the protection of dolphins by (1) reducing dolphin mortality in the ETP to levels approaching zero; (2) establishing annual dolphin mortality limits ("DML"); (3) creating incentives for vessel captains to further reduce dolphin mortality; and (4) establishing **[**9]** measures to avoid bycatch. Declaration of Panama, Oct. 4, 1995. The Panama Declaration is not self-executing. Consequently, it could not become legally

binding domestically unless Congress implemented it through domestic legislation. Cf. *Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 244, 80 L. Ed. 2d 273, 104 S. Ct. 1776 (1984)* ("Since the Convention is a self-executing treaty, no domestic legislation is required to give it the force of law in the United States.").

In 1997, Congress passed the IDCPA, Pub. L. No. 105-42, 111 Stat. 1122 (1997) (codified at *16 U.S.C. § § 1371 & 1411*), which implemented certain provisions of the Panama Declaration. The IDCPA revised the MMPA and provided new import criteria for tuna products. Under the IDCPA, a nation is allowed to import tuna into the United States if it provides documentary evidence that (1) it participates in the IDCP and is a member of the Inter-American Tropical Tuna Commission, (2) it meets its obligations under the IDCP and is a member of the Commission, and (3) it does not exceed specified DMLs. *16 U.S.C. § 1371(a)(2)(B) (2000).*

III. The Interim-Final **[**10]** Rule

In the IDCPA, Congress charged the Secretary of Commerce with drafting implementing regulations. *16 U.S.C. § 1413 (2000).* Additionally, the Act directed the Secretary of State to procure a legally binding instrument establishing the IDCP, which the Secretary did through an executive agreement, the Agreement on the International Dolphin Conservation Program (the "International Agreement"). Id. *§ 1412.*

On June 14, 1999, Commerce published a proposed rule to implement the IDCPA. Taking of Marine Mammals Incidental to Commercial Fishing Operations: Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), *64 Fed. Reg. 31,806* (June 14, 1999) ("Proposed Rule"). Commerce accepted public comment until July 14, 1999, during which time several of the Plaintiffs submitted written

comments. Subsequently, Commerce published its interim-final rule. Taking of Marine Mammals Incidental to Commercial Fishing Operations: Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), *65 Fed. Reg. 30* (Jan. 3, 1999) ("Interim-Final Rule").

The IDCPA directed the Secretary to issue regulations to implement the IDCP **[*1363]** and to **[**11]** govern the taking of marine mammals in the ETP. *16 U.S.C. § 1413(a)*. The IDCPA specified provisions that were to be included in the implementing regulations, such as requiring observers on each vessel, ensuring that backdown has begun thirty minutes before sundown, and establishing DMLs. Id. *§ 1413(a)(2)(B)*. At issue in this case is the Interim-Final Rule's provision relating to the backdown procedures. The Interim-Final Rule states, in relevant part, that "on every set encircling dolphin, the backdown procedure must be completed no later than one-half hour after sundown . . . . " *50 C.F.R. § 216.24(c)(6)(iii), 65 Fed. Reg. at 51* (emphasis added).

During the process of rule making, NMFS was also preparing an environmental assessment. As explained more fully below, under NEPA, all federal agencies must "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment," an assessment of the environmental impact through an environmental impact statement. *42 U.S.C. § 4332(2)(C) (2000)*. In order **[**12]** to determine whether an environmental impact statement is necessary, agencies prepare environmental assessments addressing the proposal's or action's impact on the human environment. NMFS's environmental assessment was designed to determine the impact of the Interim-Final Rule on the human environment. It considered three alternatives: (1) the status quo under

MMPA; (2) the Interim-Final Rule as proposed; and (3) an adjusted version of the Interim-Final Rule that required backdown to begin thirty minutes before sundown. NMFS found with respect to alternative number two that:

> allowing large U.S. purse seine vessels to deploy a net on or encircle dolphins in the course of tuna purse seine fishing in the ETP and allowing the import of yellowfin tuna catch in this manner from [the] ETP tuna purse seine fishery should not have a significant impact on any dolphin stocks in the ETP.

Environmental Assessment of Interim Final Rule to Implement the International Dolphin Conservation Program Act (P.L. 105-42) and Regulatory Impact Review 48 (1999) ("Environmental Assessment"). The environmental assessment resulted in a finding of no significant impact with respect to **[**13]** alternative number two. *Id. at 58.* Therefore, NMFS decided not to prepare an environmental impact statement.

IV. Proceedings in the Court of International Trade

On February 8, 2000, Plaintiffs filed suit in the Court of International Trade, alleging that the Interim-Final Rule was contrary to the IDCPA and therefore not in accordance with law. Plaintiffs contended that the provision of the Interim-Final Rule relating to backdown procedures was contrary to the IDCPA, because the statute required backdown to be completed one-half hour before sunset. In addition, Plaintiffs alleged that the environmental assessment prepared by NMFS was defective and violated NEPA and that an environmental impact statement should have been prepared. Plaintiffs also alleged that the findings made by the Secretary of Commerce with regard to Mexico were not in

accordance with the IDCPA and therefore did not support the lifting of the tuna embargo against Mexico. The Court of International Trade exercised jurisdiction pursuant to *28 U.S.C. § 1581(i)(3)*, which provides that "the Court of International Trade shall have exclusive jurisdiction of any civil action commenced **[**14]** against the **[*1364]** United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety . . . ." See *Turtle Island Restoration Network v. Evans, 284 F.3d 1282, 1287 (Fed. Cir. 2002)*.

On February 28, 2001, Plaintiffs moved for summary judgment on the administrative record and sought a declaratory judgment that the agency action promulgating the Interim-Final Rule violated both the IDCPA and NEPA. The government opposed Plaintiffs' motion, but did not cross-move for summary judgment.

Reviewing NMFS's rule making under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of the Administrative Procedure Act, *5 U.S.C. § 706(2)(A)*, the Court of International Trade denied Plaintiffs' summary judgment motion and entered judgment for the government dismissing the complaint. *Defenders of Wildlife, 177 F. Supp. 2d at 1373*. The court concluded that the IDCPA includes a statutory mistake in *16 U.S.C. § 1413(a)(2)(B)(v)*, **[**15]** where it states that all backdown procedures during sets of purse seine on marine mammals must be completed no later than one-half hour before sundown. *Id. at 1345*. The court further concluded that this statutory mistake resulted in an inconsistency between the IDCPA and the Interim-Final Rule that, when corrected, properly expressed the intent of Congress. *Id.* The court also concluded that NMFS's decision

not to prepare an environmental impact statement was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id. at 1359*. Finally, the court upheld the lifting of the Mexican embargo. *Id. at 1367*. Plaintiffs now appeal.[4] We have jurisdiction pursuant to *28 U.S.C. § 1295(a)(5)*.

ANALYSIS

I. Standard of Review

Summary judgment **[**16]** is appropriate where the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *U.S. Ct. of Int'l Trade R. 56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. We review the Court of International Trade's summary judgment ruling upon the administrative record de novo and without deference to the court. *Int'l Light Metals v. United States, 194 F.3d 1355, 1361 (Fed. Cir. 1999)*. We therefore apply the same standard as the Court of International Trade, holding "unlawful and setting aside agency action, findings, and conclusions found to be - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." *5 U.S.C. § 706(2)(A)*. Statutory interpretation is a matter of law that we review de novo without regard to the interpretation reached by the Court of International Trade. *SKF USA Inc. v. United States, 263 F.3d 1369, 1378 (Fed. Cir. 2001)*.

On appeal, Plaintiffs make essentially two arguments. First, they challenge the court's decision that **[**17]** the

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[4] As noted, Plaintiffs have chosen not to appeal the portion of the Court of International Trade's decision regarding the lifting of the embargo against Mexico.

Interim-Final Rule is consistent with the IDCPA. Second, they urge us to reject the court's decision that the government did not vio **[*1365]** late NEPA in promulgating the Interim-Final Rule without preparing an environmental impact statement. We address these contentions in turn.

II. Sunset Rule

The IDCPA states that the regulations promulgated under *16 U.S.C. § 1413* must "ensure that the backdown procedure during sets of purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes before sundown . . . ." *16 U.S.C. § 1413(a)(2)(B)(v)* (emphasis added). The Interim-Final Rule, on the other hand, states that "on every set encircling dolphin, the backdown procedure must be completed no later than one-half hour after sundown . . . ." *50 C.F.R. § 216.24(c)(6)(iii)* (emphasis added) ("Sunset Rule").

The Court of International Trade acknowledged that the provision of the Interim-Final Rule relating to sundown sets was contrary to the language of the IDCPA. However, the court stated: "Although the language of the regulation does appear to conflict with the express **[**18]** statutory language regarding sundown sets, it does not conflict with the intent of Congress." *Defenders of Wildlife, 177 F. Supp. 2d at 1345.* In reaching this conclusion, the court pointed to "prior legislation that is part of the same legislative scheme to protect dolphins, legislative history, practical considerations and the International Agreement" as indicating that "Congress intended to use the word 'after' rather than 'before,' to establish the cut-off period for sundown sets." *Id. at 1346.* The court noted several points. First, prior to the enactment of the 1988 amendments to the MMPA, "the Committee on Merchant Marine and Fisheries stated that 'the back-down procedures would be completed and the net would be close to the seine vessel by 30 minutes after

sundown . . . .' H.R. Rep. No. 100-970, at 31 (1988), reprinted in 1988 U.S.C.C.A.N. 6154, 6172 (emphasis added)." *Id.* Second, the court noted that, in the 1988 amendments, "Congress directed Commerce to 'prescribe regulations to ensure that the backdown procedure during sets of the purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later **[**19]** than thirty minutes after sundown.' Pub. L. No. 100-711, § 4, 102 Stat. 4755, 4767 (1988) (emphasis added)." Id. In addition, the court observed that Annex VIII to the International Agreement on the IDCP "provides that a tuna boat operating in the Agreement Area must 'complete backdown no later than thirty minutes after sunset.' Annex VIII.3.e (emphasis added)." Id. Finally, the court stated that employing a thirty minute after sundown standard made practical sense because of the difficulty a ship at sea would have in calculating the time of sundown in order to complete backdown thirty minutes before that time, whereas thirty minutes after sundown could be calculated based upon the observable phenomenon of sundown itself. Id. In short, the Court of International Trade concluded that the use of the word "before" in the statute represented a drafting error because it did not represent a true expression of Congress' intent. Id. Consequently, the court held that the provision in the Interim-Final Rule on sundown sets was not contrary to law. Id.

Plaintiffs argue that the Interim-Final Rule promulgated by NMFS is not in accordance with the IDCPA. Specifically, **[**20]** they contend that NMFS's rule is contrary to the plain language of the statute and that NMFS's rule frustrates the intent of Congress vis-a-vis dolphin protection. In **[*1366]** response, the government asserts that Congress' use of the word "before" is an inadvertent drafting mistake that should be corrected by the court. Alternatively, the government argues that Congress authorized Commerce to

alter, in its discretion, the requirements of the statute so long as the alterations are consistent with the IDCP established by the State Department in the International Agreement.

In determining whether an agency's regulatory interpretation of a statute is lawful, courts rely on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*. A court must first determine whether "Congress has directly spoken to the precise question at issue." *Id. at 842*. If Congress' intent is ascertainable, we need not reach the issue of Chevron deference, but "must give effect to the unambiguously expressed intent of Congress." *Id. at 843*. If Congress has not spoken directly to the issue, the court must **[**21]** determine if the agency's interpretation "is based on a permissible construction of the statute." *Id.*

Deciphering the intent of Congress begins with the text of the statute. *Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438, 142 L. Ed. 2d 881, 119 S. Ct. 755 (1999)* ("As in any case of statutory construction, our analysis begins with the language of the statute." (internal quotation marks omitted)). Accordingly, we begin our inquiry into the meaning of the *IDCPA* with the language of the statute itself. The statute could not be clearer in its use of the term "before," and since the statute does not define or limit the term "before," we presume Congress intended to give that term its ordinary meaning. *Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187, 130 L. Ed. 2d 682, 115 S. Ct. 788 (1995)*. The Interim-Final Rule is also clear in its use of the word "after" and, as such, directly conflicts with the statute. In this case, the language of the statute represents a clear statement of Congress' intent. *Chevron, 467 U.S. at 842* ("Where Congress has directly spoken to the precise question at issue," we do not reach Chevron deference. **[**22]**).

As noted, however, the Court of International Trade concluded that the word "before" in the IDCPA represented a drafting mistake on the part of Congress. The government, relying on *Bohac v. Department of Agriculture, 239 F.3d 1334 (Fed. Cir. 2001)*, contends that a court may change the meaning of the words of a statute in the face of an obvious mistake. It urges us to change the word "before" in the IDCPA to "after" based on the doctrine of mistake.

In Bohac, the statute at issue granted successful plaintiffs "any other reasonable and foreseeable consequential changes." *Id. at 1337* (emphasis added). It was clear from the face of the statute that the word "changes" made no sense, and accordingly, the court altered the meaning to be "any other reasonable and foreseeable consequential damages." *Id.* (emphasis added). Bohac and other cases that resort to the doctrine of mistake largely involve mistakes that are clear from the text of the statute. See *United States Nat'l Bank v. Indep. Ins. Agents of Am., 508 U.S. 439, 462, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993)* ("In these unusual cases, we are convinced that the **[**23]** placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design."). It is not clear from the face of the IDCPA, however, that the word "before" is a drafting error.

[*1367] As did the Court of International Trade, the government takes the position that Congress intended to use the word "after" instead of "before" based upon the fact that a prior legislative enactment, the 1988 amendments to the MMPA, required the backdown procedure to be completed one-half hour after the sun has set. As did the Court of International Trade, the government also relies on the statutory scheme of the IDCPA, where Congress directed the State Department to negotiate and implement an International Agreement without returning to Congress for

approval, to suggest that Congress intended the international standard to govern the implementing regulations.

In order to construe a statute contrary to the plain meaning of its text, the government must show a clear contrary intent by Congress that supports its construction. *Garcia v. United States, 469 U.S. 70, 75, 83 L. Ed. 2d 472, 105 S. Ct. 479 (1984)* ("Only the most **[**24]** extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language."). A prior statutory enactment by Congress is not indicative of the changes that Congress is likely to make at a later time. The government's argument ignores the fact that Congress may change the meaning of a statute from past provisions. Congress' prior use of the word "after" imports no additional information with respect to whether the change to the word "before" was intentional or an unintentional mistake. Additionally, the *Supremacy Clause* mandates that a statute is supreme over an executive agreement, such as the International Agreement on the IDCP. *U.S. Const. art. VI, § 1, cl. 2.* Congress, therefore, could not have intended, without more, for the International Agreement to govern the implementation of the regulations. The IDCPA clearly requires that the backdown procedure be completed one-half hour before sunset.

We find more persuasive the government's second argument. The IDCPA states that "the Secretary may make such adjustments as may be appropriate to requirements of subparagraph (B) that pertain to fishing gear, **[**25]** vessel equipment, and fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program." *16 U.S.C. § 1413(a)(2)(C).* The government argues that the period for permissible sundown sets is a "fishing practice" and that it was entitled to alter its regulation consistent with the IDCP.

Section 1413(a)(2)(C) grants Commerce the authority to make adjustments to the requirements of the IDCPA in certain circumstances.[5] We conclude that, under the current set of circumstances, NMFS was authorized to alter the backdown procedure in the IDCPA. The period for permissible sundown sets is a fishing practice subject to *section 1413(a)(2)(C)*. Moreover, the International Agreement creating the IDCP states that the backdown procedure must be completed no later than one half hour after sunset. Agreement on the International Dolphin Conservation Program, May 21, 1998, Annex VIII.3.e. In view of *section 1413(a)(2)(C)*, NMFS was authorized to draft the Interim-Final Rule in a manner consistent with the IDCP. NMFS's decision to adopt the "one-half hour after sundown" standard, therefore, is in accordance with the letter of the law. **[**26]**

[*1368] Plaintiffs object to this approach, however, because Commerce did not rely on *section 1413(a)(2)(C)* in promulgating the Interim-Final Rule. Plaintiffs thus raise a Chenery issue. See *SEC v. Chenery Corp., 318 U.S. 80, 94, 87 L. Ed. 626, 63 S. Ct. 454 (1943)* ("If the action rests upon an administrative determination - an exercise of judgment in an area which Congress has entrusted to the agency - of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so."). Chenery stands for the proposition that a court may not make its own factual findings to support an agency's determination. *Id.* Factual findings are properly left to the agency that oversees a statute. Id.

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[5] Plaintiffs do not challenge the grant of authority in *16 U.S.C. § 1413(a)(2)(C)*. That issue, therefore, is not before us.

In this case, there is not a *Chenery* problem for two reasons. First, in NMFS's response to Comment **[**27]** 81 to the Proposed Rule, NMFS relied on the International Agreement creating the IDCP as support for the Interim-Final Rule and relied on the fact that the Interim-Final Rule is consistent with the International Agreement. See Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), *65 Fed. Reg. at 39.* Second, we are not required to make additional factual findings, as was the case in Chenery. See *Fleshman v. West, 138 F.3d 1429, 1433 (Fed. Cir. 1998)* ("The doctrine does not prohibit a reviewing court from affirming an agency decision on a ground different from the one used by the agency if the new ground is not one that calls for 'a determination or judgment which an administrative agency alone is authorized to make,'" and "the doctrine does not require a remand to the agency if it is clear that 'the agency would have reached the same ultimate result' had it considered the new ground.") (citations omitted). Rather, we are called upon to determine whether NMFS had the authority under *16 U.S.C. § 1413(a)(2)(C)* to issue the Interim-Final Rule **[**28]** as drafted. In this case, NMFS already has exercised its discretion to draft the Interim-Final Rule consistently with the IDCP. For that reason, we conclude that the agency would have reached the same conclusion had it addressed the legal issue on which we rest our judgment. The government's analysis, therefore, does not run afoul of Chenery. We therefore will not disturb the decision of the Court of International Trade that the Interim-Final Rule's Sunset Rule does not conflict with the IDCPA.

III. NEPA Challenge

The Court of International Trade rejected Plaintiffs' argument that, in promulgating the Interim-Final Rule,

NMFS violated NEPA. *Defenders of Wildlife, 177 F. Supp. 2d at 1360.* The court held that the government's decision not to prepare an environmental impact statement for the Interim-Final Rule was not arbitrary or capricious. *Id. at 1359.* The court concluded that "Defenders failed to show the court that the NMFS committed error in preparing the [environmental assessment], and certainly failed to convince the court that the [environmental assessment] is defective and represents an abuse of agency discretion." *Id. at 1360.* **[**29]**

As they did in the Court of International Trade, Plaintiffs contend that, in promulgating the Interim-Final Rule, Commerce violated NEPA. Specifically, Plaintiffs assert that NMFS's decision not to prepare an environmental impact statement was arbitrary and capricious because its environmental assessment for the Interim-Final Rule was deficient. Plaintiffs level essentially four charges at the environmental **[*1369]** assessment: (1) that it was based upon inaccurate and dated information; (2) that it erroneously took a piecemeal approach and failed to consider the cumulative effects on the dolphin population of various environmental impacts; (3) that it failed to address certain problems with the dolphin safe-label program; and (4) that it was flawed because of the lack of public participation in the process.

The government responds that NMFS's environmental assessment was thorough and complete. The government claims that it properly delineated the affected environment, that it considered reasonable alternatives, and that it analyzed the environmental effects of each of the alternatives. Moreover, it argues, NMFS's decision not to file an environmental impact statement for the Interim-Final **[**30]** Rule was not arbitrary or capricious.

NEPA requires all federal agencies to prepare an environmental impact statement on all "major Federal actions significantly affecting the quality of the human environment." *42 U.S.C. § 4332(2)(C)*. The environmental impact statement requirement ensures that agencies take a "hard look" at the environmental consequences of their actions and at possible alternatives. *Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21, 49 L. Ed. 2d 576, 96 S. Ct. 2718 (1976)*. Each agency is responsible for its own compliance with NEPA. Congress, however, created a central agency, the Council on Environmental Quality ("CEQ"), to coordinate agencies' compliance with NEPA, and CEQ promulgated regulations for implementing NEPA that are binding on all agencies. *40 C.F.R. § 1500*. These regulations help agencies determine whether an environmental impact statement is required.

When an agency decides whether or not to prepare an environmental impact statement, it creates an environmental assessment. Through the environmental assessment, the agency considers whether the action it is taking is a major federal action and whether it significantly **[**31]** affects the human environment. *42 U.S.C. § 4332(2)(C)*. If an agency determines on the basis of its environmental assessment that it need not prepare an environmental impact statement, it must make a finding of no significant impact and support it with a statement of reasons why the impact of its proposed action is insignificant. *40 C.F.R. § 1501.4*. In addition, the finding of no significant impact must be made available to the impacted public. Id.

The CEQ regulations direct agencies to determine whether the proposed action is one that normally requires an environmental impact statement or normally does not require an environmental impact statement. Id. In this case, the NOAA promulgated procedures stating that the issuance of

rules that affect the taking of marine mammals are actions that normally require an environmental assessment, but not necessarily an environmental impact statement. Environmental Review Procedures for Implementing the National Environmental Policy Act § 6.03(f)(1) (1999), available at http://www.rdc.noaa.gov/nao/216-6.html (last modified May 20, 1999).

In scrutinizing an agency's determination **[**32]** of no significant impact, courts look to the four-part test laid out in *Sierra Club v. Peterson, 230 U.S. App. D.C. 352, 717 F.2d 1409, 1413 (D.C. Cir. 1983)*. First, the court must ascertain if the agency took a "hard look" at the environmental problem. *Id.* Second, the court must determine if the agency identified the relevant areas of environmental concern. Id. Third, the court must determine whether the agency made a convincing case that the impact was insignificant. Id. **[*1370]** Finally, the court must decide whether the agency sufficiently minimized any impact. Id. A decision not to prepare an environmental impact statement should only be set aside if the decision is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Id.; cf. *Marsh v. Or. Natural Res. Council, 490 U.S. 360, 375, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989)*. Moreover, the scope of review is limited to the administrative record. Id.

We begin with the premise that, through the IDCPA, Congress chose to permit fishermen to import and sell in the United States tuna caught by the purse seine method of fishing. Congressional **[**33]** determinations, such as this, are not subject to the requirements of NEPA. Instead, we must decide whether NMFS, in deciding whether to prepare an environmental impact statement, took a "hard look" at the dolphin mortality problem and at the effect of the Interim-Final Rule that implemented Congress' determinations.

In this case, NMFS identified the relevant areas of environmental concern. It took a hard look at the dolphin mortality problem, and it established that there was not a significant impact posed by its regulations. NMFS defined the affected environment as the physical environment, the biological environment, tuna purse seine fishing in the ETP, and the economic environment. Environmental Assessment at 16-40. Moreover, NMFS compared the impacts of three alternatives. The IDCPA included many requirements for the regulations, and therefore, the alternatives that NMFS could consider were restricted. See *16 U.S.C. § 1413(a)(2)(B)(i)-(xii)*. We hold that NMFS complied with NEPA and reasonably exercised its discretion in reaching its finding of no significant impact. We consider each of Plaintiffs' arguments to the contrary in turn.

Plaintiffs' **[**34]** arguments generally revolve around their contention that NMFS failed to consider how the physiological stress of the extended chase preceding encirclement, mother/calf separation, and the under-reporting of direct kills by ship captains would hinder the dolphin populations' recovery. Plaintiffs contend that NMFS failed to take a "hard look" at these environmental impacts and therefore improperly concluded that there would be no significant impact.

A. Inaccurate and Dated Information

The IDCPA directed Commerce to report on "the effect of intentional encirclement (including chase) on dolphins and dolphin stocks incidentally taken in the course of purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean." *16 U.S.C. § 1414a(a)(1) & (4)*. On March 25, 1999, NMFS submitted a report ("1999 Report") to Congress. The 1999 Report concluded that the northeastern offshore spotted dolphin population and the eastern spinner dolphin

population were "not increasing at the rate expected based on the low rate of reported mortalities from the fishery since 1991 and the reproductive potential for these populations." 1999 Report, at vi. In the 1999 **[**35]** Report, NMFS considered non-fishery and fishery-related explanations for the populations' failure to recover and ruled out the possibility of large-scale environmental changes that could have affected the populations. It turned instead to fishery-related explanations and, in particular, stress caused by an extenuated chase, separation of calves from their mothers as a result of the chase, and under-reporting of direct kills by fishing captains. NMFS concluded **[*1371]** that the "information suggests but by no means conclusively that the fishery has been the source of significant adverse impact on these two populations." Id. at 22.

Plaintiffs contend that NMFS did not consider the 1999 Report when it determined that "all stocks, including the depleted eastern spinner stock and the northeastern offshore spotted stock, are stable or slightly increasing . . . ." Environmental Assessment at 42. Plaintiffs also contend that NMFS failed to cite or consider four research papers prepared for the report: (1) Curry, B.E., Stress in Mammals: The Potential Influence of Fishery-Induced Stress on Dolphins in the Eastern Tropical Pacific Ocean; (2) Fiedler, P.C., Eastern Tropical Pacific Dolphin **[**36]** Habitat Variability; (3) Gerrodette, T., Preliminary Estimates of 1998 Abundance of Four Dolphin Stocks in the Eastern Tropical Pacific; and (4) Goodman, D., Decision Framework for Assessing the Status of the Eastern Tropical Pacific Dolphin Stocks. Plaintiffs argue that these papers represented the highest quality information prepared by NMFS's own staff at the time the environmental assessment was being prepared and that the papers and the 1999 Report were all consistent with each other. Plaintiffs conclude that

NMFS's failure to consider these documents rendered its environmental assessment arbitrary and capricious.

NMFS's failure to cite the 1999 Report and the four research papers does not mean that NMFS did not consider them. It means only that NMFS did not specifically rely on them to reach its finding of no significant impact. The choice of what information to rely upon is properly within the discretion of the agency, and the decision not to rely on a specific report does not render the environmental impact arbitrary and capricious.

B. Cumulative Effects Under Regulatory Actions

Plaintiffs further argue that NMFS illegally separated its environmental assessment **[**37]** for the Interim-Final Rule from the environmental assessment for three earlier regulatory actions and failed to consider the cumulative effects of these earlier regulatory actions on the dolphin populations. The earlier regulatory actions for which environmental assessments were prepared are as follows: (1) Regulations to Implement Management and Conservation Measures Under the Pacific Tunas Conventions Act (1999); (2) Measures to Reduce Bycatch by U.S. Vessels in the ETP Purse Seine Fisheries and Information Collection for a Regional Vessel Register (2000); and (3) Chase-Recapture Experiment Under the International Dolphin Conservation Program Act (2001). Plaintiffs claim that the Interim-Final Rule and these regulatory actions were closely related in subject matter and time and that all four actions should have been considered together in a single environmental assessment, as required by the CEQ. See *40 C.F.R. § 1502.4(a)* ("Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.");

see also id. § *1508.25(a)(2)*; *Kleppe, 427 U.S. at 409-10.* **[**38]** We are not persuaded by this argument.

Plaintiffs' statement that "the subject matter in all four of these [environmental assessments] possess obvious synergies . . . ." is not enough, without more, to show that the Interim-Final Rule and the three cited actions were so closely related to each other that they comprised a single course of action requiring a single environmental assessment. See *Kleppe, 427 U.S.* **[*1372]** *at 412* ("The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies."). Absent a showing by the Plaintiffs of arbitrary action, we must assume that NMFS appropriately exercised its discretion by considering the Interim-Final Rule alone in this environmental assessment.

C. Dolphin-Safe Tuna Label

In May of 1999, Commerce published an initial finding regarding the impact of the intentional encirclement **[**39]** of dolphin in the ETP, concluding that "there is insufficient evidence that the chase and encirclement by tuna purse seine fishery 'is having a significant impact' on depleted dolphin stocks in the ETP." Taking of Marine Mammals Incident to Commercial Fishing Operation; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, *64 Fed. Reg. 24,590-91* (May 7, 1999) ("Initial Finding").[6] The

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[6] This finding was issued by Commerce pursuant to *16 U.S.C. § 1385(g)(1).*

Secretary's finding that the intentional encirclement of dolphins was not having a significant adverse impact on any depleted stock of dolphin automatically triggered a change in the "dolphin safe" labeling standard. See *16 U.S.C. § 1385(d) & (h)(2)*. The new standard allows tuna products that contain tuna harvested in the ETP to carry the dolphin safe mark (1) if the tuna was caught on a vessel that was not capable of deploying purse seine nets on dolphins or (2) if a certification accompanies the product stating that "no dolphins were killed or seriously injured during the sets in which the tuna were caught." Id. *§ 1385(d)(2) & (h)(1)*. **[**40]**

The Secretary's Initial Finding was challenged in the United States District Court for the Northern District of California, where the district court found that the Initial Finding was contrary to law and an abuse of the Secretary's discretion. *Brower v. Daley, 93 F. Supp. 2d 1071 (N.D. Cal. 2000)*. In affirming, the Ninth Circuit stated that, based upon the research conducted by NMFS, "all of the evidence indicated that dolphins are adversely impacted by the fishery." *Brower v. Evans, 257 F.3d 1058, 1071 (9th Cir. 2001)*. The court struck down the Initial Finding, causing the dolphin safe labeling standard to automatically revert to the

original standard embodied in *16 U.S.C. § 1385(h)(2)*.[7] **[**41]**

Plaintiffs argue that the environmental assessment failed to address several problems with the dolphin safe-label program. Specifically, they contend that the Ninth **[*1373]** Circuit's holding in Brower is inconsistent with NMFS's finding of no significant impact in the environmental assessment. Brower, however, interpreted the provisions in *16 U.S.C. § 1385(g)* regarding the Secretary's initial finding requirement and then considered the sufficiency of the Secretary's Initial Finding. *Brower* did not address the question involved here, i.e., whether NMFS's finding that the Interim-Final Rule does not pose a significant impact to the affected environment was arbitrary or capricious.

Plaintiffs also argue that NMFS prepared the environmental assessment based on fundamentally incorrect assumptions, including the assumption that the dolphin safe labeling standard would change and the assumption that

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[7] The original standard allows tuna products that contain tuna harvested in the ETP to carry the dolphin safe mark if a certification accompanies the product stating that "no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured during the sets in which the tuna were caught." *16 U.S.C. § 1385(d)(2) & (h)(2)*. The original standard is applied only if the tuna were caught on a trip commencing before the effective date of the initial finding by the Secretary or after the effective date of such initial finding, where the initial finding was that the intentional deployment on or encirclement of dolphins was having a significant adverse impact on any depleted dolphin stock. Id. *§ 1385(d) & (h)*.

Customs would be able to regulate which tuna may properly be imported into the United States. Plaintiffs contend that these assumptions are flawed and that the reliability of the environmental assessment is undermined. Moreover, Plaintiffs argue that these assumptions **[**42]** violate the "high quality information" and "excellent action" requirements in *40 C.F.R. § 1500.1*.[8] Plaintiffs, however, fail to establish how these concerns would affect NMFS's analysis of the impact on the dolphin populations or how they render the environmental assessment arbitrary. Rather, they only support Plaintiff's contention that consumers will not know whether the tuna they purchase is caught in a manner that is truly safe for dolphin populations. These arguments are not sufficient to render NMFS's finding that there is no significant impact to the human environment arbitrary or capricious.[9]

[43]**

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[8] *40 C.F.R. § 1500.1(b)* states that "the information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." Moreover, *section 1500.1(c)* states that "NEPA's purpose is not to generate paperwork--even excellent paperwork--but to foster excellent action."

[9] Plaintiffs argue that the tuna tracking forms utilized by Customs for verification purposes do not identify tuna that have been caught by encirclement, which is the unchanged labeling standard. Plaintiffs also argue that Mexican-brand tuna has illegally entered the United States in the past because Customs could not properly track the tuna. Whatever the merit of these concerns, Plaintiffs have failed to show how they establish error with respect to the environmental assessment that NMFS prepared.

D. Participation by the Public, State Department, Department of Treasury, and Customs Service

Finally, Plaintiffs argue that the environmental assessment is flawed because of the lack of public participation in the process and the lack of participation by the State Department, Department of Treasury, and/or Customs Service.[10] Specifically, Plaintiffs contend that the public should have been given the opportunity to comment on the proposed environmental assessment.

Public participation is required by the CEQ regulations if the proposed action is without precedent or is similar to an action that normally requires preparation of an environmental impact statement. *40 C.F.R. § 1501.4(e)(2).* In such **[**44]** cases, an agency must make its proposed finding of no significant impact available for public review thirty days before the agency **[*1374]** makes its final determination whether to prepare an environmental impact statement. Id. The government argues that the two circumstances requiring public review were not present here. It cites the 1999 environmental assessment of regulations that implemented the Pacific Tunas Conventions Act, which resulted in a finding of no significant impact, to suggest that the Interim-Final Rule is not the type of action that normally results in an environmental impact statement. For their part, Plaintiffs point to the 1980 implementing regulations for the MMPA that resulted in an environmental impact statement. The Court of International Trade found that NMFS's environmental assessment was not a functional equivalent of

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[10] At oral argument, counsel for Plaintiffs stated that he was not arguing that the State Department should have prepared its own environmental assessment and environmental impact statement for the International Agreement, but that it should have participated in Commerce's process.

an environmental impact statement and that therefore there was no need for a public comment period on the draft environmental assessment. *Defenders of Wildlife, 177 F. Supp. 2d at 1364*. We agree. The two agency implementing regulations, the Pacific Tunas Conventions Act implementing regulations, see *50 C.F.R. § 300 (2000)*, **[**45]** which resulted in a finding of no significant impact, and the 1980 implementing regulations for the MMPA, see *50 C.F.R. § 216.24 (1980)*, which resulted in an environmental impact statement, suggest that this type of action does not always result in an environmental impact statement, and therefore NMFS was not required to publish its finding of no significant impact thirty days prior to the agency's final determination.

Plaintiffs also argue that the State Department as well as the Department of the Treasury and/or the Customs Service should have been involved in the preparation of the environmental assessment. We disagree. NMFS's environmental assessment took into consideration the views and concerns of the State Department and the Customs Service. See Environmental Assessment at 53-54; *65 Fed. Reg. at 41* cmt. 96. Plaintiffs, therefore, have not convinced the court that NMFS acted improperly in preparing its environmental assessment.

We hold that NMFS complied with the law and reasonably exercised its discretion as far as the NEPA process is concerned. NMFS took a "hard look" at the dolphin mortality problem and the effects of the Interim-Final **[**46]** Rule on the environment, and NMFS considered the relevant areas impacted by its regulation. Additionally, NMFS found that the preferred Interim-Final Rule would not have a significant impact on the dolphin stock in the ETP. NMFS's decision not to prepare an

environmental impact statement was not arbitrary or capricious.

CONCLUSION

The Court of International Trade did not err in concluding that the Interim-Final Rule promulgated by NMFS is in accordance with the IDCPA. Neither did the Court of International Trade err in concluding that NMFS complied with NEPA. The decision of the court is therefore affirmed.

No costs.

AFFIRMED

CONCURBY: NEWMAN (In Part)

DISSENTBY: NEWMAN (In Part)

DISSENT: NEWMAN, Circuit Judge, concurring in part, dissenting in part.

At issue is the promulgation of regulations that directly contradict the provisions of the statute that authorizes them. The panel majority correctly holds that the agency erred in concluding that Congress was mistaken when it mandated that the fishing activity under consideration must **[*1375]** stop one half hour before sunset. However, the majority then affirms the agency regulatory action on different grounds, not relied upon by the agency. **[**47]** Since this is not only a violation of administrative law, but an incorrect statutory interpretation, I respectfully dissent from that portion of the court's opinion that upholds the agency's regulation, and from the ensuing result.

A. The statute was enacted to reduce the massive injury to the dolphin population by the purse seine method of tuna fishing. For some unknown reason, schools of tuna swim under schools of dolphins. When the dolphins are observed at the surface, they and the underlying tuna are herded together and encircled by a large and deep net, by means of speedboats, helicopters, and underwater explosives. The net is then closed to hold the entire catch. This is followed by a "backdown" procedure, to release those dolphins that have not drowned or been killed in the herding operation. The process is imperfect, and some of the released dolphins subsequently die of injuries sustained in the process, or are unable to re-establish contact with nursing calves, which then die. The amici curiae state that over seven million dolphins have died in purse seine tuna fishing.

The regulation in question was promulgated pursuant to *16 U.S.C. § 1413(a)(1)* **[**48]** ("The Secretary shall issue regulations, and revise those regulations as may be appropriate, to implement the International Dolphin Conservation Program.") The statute requires that these regulations "shall include provisions . . . ensuring that the backdown procedure during sets of purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes before sundown." *16 U.S.C. § 1413(a)(2)(B)(v)* (emphasis added). Instead of implementing the statute, however, the regulations state that the backdown procedure must be completed "no later than 30 minutes after sundown." The regulation cannot be reconciled with the statute.

The government argues that Congress simply made a mistake in using the word "before" in the statute, and thus that the agency did not have to follow the statute. The Court of International Trade upheld the regulation on that ground. The panel majority correctly rejects this argument, for there

is no evidence whatsoever that congressional intent was contrary to congressional enactment. See *Garcia v. United States, 469 U.S. 70, 75, 83 L. Ed. 2d 472, 105 S. Ct. 479 (1984)* (requiring **[**49]** "the most extraordinary showing of contrary intentions" to disregard the plain meaning of a statutory provision).

B. However, the panel majority holds that the agency has discretion to ignore the statute. The court holds, sua sponte, that the statutory provision that "The Secretary may make such adjustments as may be appropriate to requirements of subparagraph (B) that pertain to fishing gear, vessel equipment, and fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program," *16 U.S.C. § 1413(a)(2)(C)*, authorizes the Secretary to change the statutory "30 minutes before sundown" to "30 minutes after sundown" in the regulations. I cannot agree.

The Secretary was authorized only to make "such adjustments as may be appropriate," not to contradict a critical provision **[*1376]** of the statute. Since the court agrees that "before sundown" was not a mistake, it cannot be "appropriate" or an "adjustment" to change it. When the statute clearly sets forth a provision, further "interpretation" is not only unnecessary, it is prohibited. See *Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)* **[**50]** ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") Here Congress could not be clearer, and there is no basis whatsoever for interpreting "30 minutes before sundown" to mean 30 minutes after sundown. That is not a "permissible" construction of the statute. *Id. at 843*. See *Regions Hospital*

v. Shalala, 522 U.S. 448, 457, 139 L. Ed. 2d 895, 118 S. Ct. 909 (1998) ("If, by 'employing traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter,'") (quoting Chevron). The time to complete the backdown procedure was not left to agency discretion or interpretation, but was explicitly placed in the statute. It is a matter neither of interpretation or discretion. The intent of Congress was unambiguously stated as to "the precise question at issue." *Chevron, 467 U.S. at 842.*

C. The majority recognizes that this court is not free to affirm a discretionary agency action on grounds upon which the agency did not rely. See *Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947)* **[**51]** (if the agency's grounds are improper, the court cannot affirm the administrative action by substituting other grounds). Since the Secretary's decision was based on the erroneous conclusion that Congress made a mistake, the court cannot rehabilitate the agency's action on some other ground. *Fleshman v. West, 138 F.3d 1429, 1433 (Fed. Cir. 1998)*, does not hold otherwise, for that case related to grounds not consigned to agency discretion and authority. Here, however, Congress granted the Secretary the authority only to "adjust" the provisions of *16 U.S.C. § 1413(a)(2)(B)*, not to countermand them in a major way.

The panel majority justifies the Secretary's departure from law by citing the Secretary's statement during the comment period that this change "is consistent with the International Agreement." A less favorable (to dolphins) time limit appears in the International Dolphin Conservation Program. However, this does not authorize the agency to override the statutory enactment.

APPENDIX B

UNITED STATES COURT
OF INTERNATIONAL TRADE

No. 00-02-00060

DEFENDERS OF WILDLIFE, ET AL., Plaintiffs,

v.

WILLIAM T. HOGARTH, ET AL.,
Defendants.

December 7, 2001, Decided

Before Judge JUDITH M. BARZILAY.

BARZILAY, JUDGE:

I. INTRODUCTION

In this case, the court is asked to evaluate the latest actions taken by the government of the United States in its long effort to protect dolphins endangered as a result of certain tuna-fishing practices. This government action began in 1972, **[**2]** with the passage of the United States Marine Mammal Protection Act ("MMPA"), driven by intense interest in and activity on behalf of dolphins by U.S. individuals and environmental groups, some of whom find

themselves on opposite sides of the question at bar in the current case.[a]

[3] [*1338]**

Defenders of Wildlife[b] challenge three administrative determinations made by Penelope D. Dalton, *et al*,[c] to

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[a] For a detailed history of the numerous U.S. statutory enactments and international efforts to protect dolphins, including the inevitable unintended and unforeseen consequences, and the backlashes and conflicts, see Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn From the Tuna-Dolphin Conflict, 12 GEO. INT'L ENVTL. L. REV. 1, 6 (1999).* ("For nearly ten years, the tuna-dolphin issue has been identified with trade and environment conflict. Nearly lost in the legal conflict has been the story of the quiet emergence of one of the most innovative and effective environmental regimes in the world--a regime which has reduced dolphin mortality by over 99% while eliciting a very high level of compliance from all fishers and flag states in the fishery.")

[b] Plaintiffs in this cause are Defenders of Wildlife, Earth Island Institute, Humane Society of the United States, Environmental Solutions International, Animal Welfare Institute, International Wildlife Coalition, American Humane Association, Earthtrust, Greenpeace Foundation, Animal Fund, American Society for the Prevention of Cruelty to Animals, David Brower, Samuel Labudde, Craig Van Note, and the Sierra Club. The court refers to Plaintiffs collectively and interchangeably as "Defenders of Wildlife," "Defenders," and "Plaintiffs."

[c] By delegation, the Secretary of Commerce gave Penelope D. Dalton, in her official capacity as the Assistant Administrator for Fisheries for the National Marine Fisheries Service ("NMFS"), an organization of the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce ("Commerce"), the authority to render these findings. She subsequently was replaced by William T. Hogarth. The named

implement the 1997 International Dolphin Conservation Program Act ("IDCPA"), which amended the MMPA. Specifically, Plaintiffs make three distinct claims: (1) that Commerce's *Interim-Final Rule* on the taking of allegedly depleted dolphins pursuant to fishing operations by tuna purse seine vessels in the Eastern Tropical Pacific ("ETP") ocean violates the MMPA, (2) that the Environmental Assessment ("EA") prepared by Defendants violates the National Environmental Policy Act ("NEPA") and applicable regulations, and that Defendants should have completed an Environmental Impact Statement ("EIS") for the entire new tuna/dolphin program, and (3) that the affirmative finding rendered by the United States Department of Commerce ("Commerce"), which lifted the United States' tuna embargo against Mexico, violates the IDCPA and NEPA. Defenders seek a declaratory judgment, a remand to Commerce with instructions to issue a revised proposed rule, and an order to Defendants to complete an EIS on the new tuna/dolphin program. Plaintiffs do not now seek a reinstatement of the embargo, **[**4]** but reserve their right to do so. Defendants oppose Plaintiffs' motion. The court exercises jurisdiction under *28 U.S.C. § 1581*(i)(3) (1994). **[**5]**

II. BACKGROUND

The ETP is a seven million square mile stretch of ocean running from the coast of southern California to Peru. Yellowfin tuna swim beneath dolphins in these waters. Because dolphins surface for air and are hence more visible than tuna, fishermen in the ETP use dolphin sightings as an aid to catch tuna. One common method of fishing for tuna in

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Defendants in this case are William T. Hogarth, the Secretary of Commerce, the Under Secretary of Commerce, the Assistant Secretary of the NOAA, the Secretary of State, and the Secretary of the Treasury. Throughout the opinion the court refers to Defendants collectively.

the ETP involves lowering a commercial fishing net, called a purse seine, into the water around a group of dolphins. Once the net encircles the dolphins, a drawstring around the bottom of the net is closed to catch the yellowfin tuna below. During this process dolphins may become entrapped in the net. While some dolphins are released alive, others suffocate by the time a release can be made. **[*1339]** Although certain safety devices in the nets and other changes in fishing practice have significantly decreased the number of dolphin mortalities associated with the purse seine method, some dolphin deaths continue to occur.

A. Background Legislation

In the early 1970s, an estimated 350,000 dolphins were killed annually due to purse seine fishing. Congress passed the MMPA in 1972 in response to public concern over the ETP yellowfin **[**6]** tuna fishing industry. *16 U.S.C. § 1361* (1972). Congressional findings indicated that

> (1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities; [and that]
>
> . . .
>
> (6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management

> should be to maintain the health and stability of the marine ecosystem.

16 U.S.C. § 1361(1), (6). The MMPA centered on the principle of fisheries management to foster a sustainable population. The act primarily relied on a permit system to regulate fishing practices.

In 1988, Congress enacted the Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, 102 Stat. 4755 (1988) ("1988 Amendments"), which specified criteria to be satisfied for the regulatory program of a tuna-harvesting nation **[**7]** to be considered comparable to that of the United States, and thus have access to the U.S. market. Pub. L. No. 100-711 at § 4, 102 Stat. at 4765. In 1990, Congress enacted the Dolphin Protection Consumer Information Act, ("DPCIA"). The DCPIA made it a violation of section 5 of the Federal Trade Commission Act ("FTCA") for any producer, importer, exporter, distributor, or seller of any tuna product sold in or exported from the United States to label that product as "dolphin-safe" if the product contained tuna harvested (a) on the high seas by a vessel engaging in driftnet fishing, or (b) in the ETP by a vessel using the purse seine method, unless the tuna was accompanied by various statements demonstrating that no dolphin was intentionally encircled during the trip in which the tuna was caught.

Pursuant to the 1988 Amendments, in August of 1990, the United States imposed an embargo on Mexico for failure to achieve comparability with U.S. tuna harvesting standards. H.R. Rep. No. 105-74(I), at 13 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1628, 1631. Mexico then requested the establishment of a dispute settlement panel in accordance with the General Agreement on Tariffs and Trade ("GATT"). **[**8]** The panel concluded that the U.S. tuna embargoes violated GATT. However, the panel's decision was not

adopted by the GATT Council, and was not pursued further by Mexico in the World Trade Organization ("WTO"), GATT's successor. In 1993, the European Union ("EU") brought a GATT challenge relating to the tuna embargo provisions of the MMPA. A GATT panel again ruled against the United States, but again the GATT Council did not adopt the decision.

In June of 1992, the United States entered into the La Jolla Agreement, a non-binding international agreement setting forth programs to protect dolphins from harm in the ETP, and allowing the practice of purse seine fishing with dolphin mortality caps. Six months later, Congress enacted the International Dolphin Conservation Act of 1992 ("IDCA"), which amended the MMPA by (a) imposing a **[*1340]** five-year moratorium upon the harvesting of tuna with purse seine nets; and (b) lifting tuna embargos upon those nations making a declared commitment to implement the moratorium and take further steps to reduce dolphin mortality. 1997 U.S.C.C.A.N. at 1632. The La Jolla Agreement led to the signing of the Panama Declaration, under which the United States and eleven **[**9]** other nations made affirmative commitments to strengthen the protection of dolphins by (a) reducing dolphin mortality to levels approaching zero, with the goal of eliminating dolphin mortality in the ETP; (b) establishing annual dolphin mortality limits ("DMLs"); (c) avoiding bycatch of immature yellowfin tuna and other non-target species such as sea turtles; (d) strengthening national scientific advisory committees; (e) creating incentives for vessel captains; and (f) enhancing the compliance of participating nations to these commitments. The Panama Declaration also sought to negotiate a new binding agreement to establish the International Dolphin Conservation Program ("IDCP"), contingent upon the United States amending its laws to (a) lift the embargoes imposed under the MMPA; (b) permit the

sale of both dolphin-safe and non-dolphin safe tuna in the United States market; and (c) change the definition of "dolphin-safe tuna" to mean "tuna harvested without dolphin mortality," rather than tuna harvested without any dolphin encirclement. *Panama Declaration* at Annex I.

In 1997, Congress enacted the International Dolphin Conservation Program Act ("IDCPA"), which is the subject of **[**10]** this litigation. Pub. L. No. 105-42, 111 Stat. 1122 (1997). The act stated three purposes: (a) to give effect to the Panama Declaration; (b) "to recognize that nations fishing for tuna in the [ETP] have achieved significant reductions in dolphin mortality;" and (c) "to eliminate the ban on imports of tuna from those nations that are in compliance with the [IDCP]." *See id.* at § 2, 111 Stat. at 1122. The IDCPA amended the MMPA yet again and revised the criteria for banning imports. A nation would be permitted to export tuna to the United States if it provided documentary evidence that (a) it participates in the IDCP and is a member of the Inter-American Tropical Tuna Commission ("IATTC"); (b) it meets its obligations under the IDCP and the IATTC; and (c) it does not exceed certain DMLs. *See id.* at § 4, 111 Stat. at 1123-1124 *(16 U.S.C. § 1371*(a)(2)(B)). Furthermore, the IDCPA changed the "dolphin-safe" labeling standard by amending the DPCIA. Pursuant to this amendment, the Secretary of Commerce was directed to make initial and final findings of "whether the intentional deployment on or encirclement of dolphin with purse seine nets is having a significant **[**11]** adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean." *16 U.S.C. § 1385*(d)(2). These findings would in turn be used to determine whether to revise the definition of "dolphin-safe" tuna. *See 16 U.S.C. § 1385*(d). The IDCPA provided that it would become effective when the Secretary of State certified that a legally-binding instrument establishing the IDCP had

been adopted and was put into force. *See* PL 105-42 at § 8; 111 Stat. at 1139. [d]

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[d] This provision, basing the effective date of the statute on the completion of a legally binding international agreement, is not the only noteworthy feature of the legislation. It amends the existing dolphin protective scheme for the specific purpose of supporting international efforts to protect dolphins and other species. *See* 111 Stat. at 1112 § 2. It empowers the Secretaries of State and Commerce to "seek to secure a binding international agreement to establish an International Dolphin Conservation Program...." 111 Stat. at 1129, Sec. 6, § 302. Although the language is specific with regard to some of the required features of such a program, it clearly contemplates that the parameters of the program await future negotiation and completion. For that reason, the language of the various provisions refer continually to the International Dolphin Conservation Program and its requirements in several contexts, including the documentation required for a nation's commercial fishing product to be imported in the United States. 111 Stat. at 1123, § 4(b)(1)(B)(iii). Other references to the international program appear in sections dealing with such topics as the setting of dolphin mortality limits, 111 Stat. at 1129, Sec. 6, § 302, what specialized fishing equipment may be required, 111 Stat. at 1129, Sec. 6, § 303(a)(2)(B)(iv), and the requirement to consult with the international governing body if the United States needs to take steps to reduce unusual incidental mortality or serious injury to dolphins. 111 Stat. at 1131, Sec. 6, § 303(2)(C)(c). Overall, the act attempts to balance the goals of opening the United States' market to the international fishing industry in exchange for its adopting more protective fishing practices and closely monitoring the results of this liberalization by requiring scientific research into the health of dolphin populations. However, even during the important monitoring process, the act requires consultation with the international governing body when the Secretary of Commerce undertakes the scientific research necessary to trigger the change in the meaning of the dolphin-safe tuna label. 111 Stat. at 1133, Sec. 6, § 304. *See also* § B of the opinion.

[12] [*1341]**

The IDCPA and the subsequent international agreement represented a change in policy on the part of the United States. Congress clearly endorsed the idea that a new approach was needed. It understood that the embargo had limited leverage on the international community. As Sen. Chafee pointed out, "the ETP is completely outside the jurisdiction of the United States. We cannot simply go in and tell others how to fish. Instead our best chance of promoting conservation is through a multilateral, rather than unilateral, forum." 143 Cong. Rec. S8294-02, 8304 (1997). Congress, however, was not abandoning its efforts to preserve the ecosystem. The safer procedures of seine-net fishing gaining acceptance among those fishing in the ETP, and embodied in the Panama Declaration, pointed to a more effective regime. That regime directly contributed to the reduction in dolphin mortality witnessed in the past decade. It also had the benefit of protecting the entire ecosystem, and not just one species. As the House Committee Report noted, alternative methods imperiled species other than dolphins, including sharks, billfish, sea turtles, and a great number of immature tuna. H.R. Rep. 105-74(I), at 37. **[**13]**

With the IDCPA Congress endorsed, and charged the Executive Branch with executing, a simple trade-off. The U.S. would lift the existing embargo if other nations agreed to bind their vessels to the new, more protective practices. In addition, the crucial compromise struck during Senate consideration of the bill provided a fail-safe. While the embargo could be lifted immediately, the "dolphin-safe" label would remain in place pending a scientific review by the Department of Commerce. That review is now the subject of litigation in the Northern District of California. *See Brower v. Daley, 93 F. Supp. 2d 1071 (N.D. Cal. 2000) aff'd 257 F.3d 1058 (9th Cir. 2001).* Following enactment of the IDCPA, in May of 1998, the eight nations that signed the

Panama Declaration signed the Agreement on the International Dolphin Conservation Program ("International Agreement"). The International Agreement became effective on February 15, 1999, after four nations (United States, Panama, Equador, and Mexico) deposited their instruments of "ratification, acceptance, or adherence with the depository for the agreement." Art XXVII; *see also IDCPA* at § 8, 111 Stat. at **[**14]** 1139.

B. The Initial Finding, the Proposed Rule, and the Interim-Final Rule.

In May of 1999, Commerce, acting through the NMFS and the NOAA, published **[*1342]** its initial finding pursuant to the IDCPA. *See Taking of Marine Mammals Incident to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, 64 Fed. Reg. 24590, 24591* (May 7, 1999) ("*Initial Finding*"). In the *Initial Finding*, Commerce allowed for the change in the meaning of the tuna label when it determined that no sufficient evidence existed to conclude that intentional encirclement of dolphins with purse seine nets was having an adverse effect on depleted dolphin stock in the ETP. The *Initial Finding* was challenged in the Northern District of California. *See Brower v. Evans, 257 F.3d at 1060.* The district court granted the plaintiffs' motion for summary judgment, holding that the Secretary abused his discretion when he triggered a change in the dolphin-safe label standard on the ground that he lacked sufficient

evidence of significant adverse impacts.[c] *See Brower v. Daley, 93 F. Supp. 2d at 1089.* **[**15]**

On June 14, 1999, Commerce published a proposed rule to implement the IDCPA. *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 64 Fed. Reg. 31806 (June 1999)* ("*Proposed Rule*"). Commerce accepted public comments on the *Proposed Rule* through July 14, 1999. Several plaintiff organizations submitted written comments on the *Proposed Rule* and testified at the public hearings. Commerce then published its interim-final rule. *Taking of* **[**16]** *Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30* (Jan 3, 2000) ("*Interim-Final Rule*").

On April 12, 2000, Commerce found that the Government of Mexico met the requirements of MMPA section 101(a)(2)(B) and (C) to import yellowfin tuna harvested in the ETP by purse seine vessels into the United States. Notice of this finding was published in the Federal Register on May 8, 2000. *Taking and Importing of Marine Mammals, 65 Fed. Reg. 26585* (May 8, 2000).

C. Procedural History of this Litigation

On February 8, 2000, Plaintiffs filed their original complaint with the court. Upon learning of the pending

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[c] The trial court judge noted the extremely specific terms of the statute requiring research into the stress impact on dolphins of purse seine net fishing, the lack of any preliminary data from such projects, and concluded, "the Secretary acted contrary to the law and abused his discretion when he triggered a change in the dolphin safe label standard on the ground that he lacked sufficient evidence of significant adverse impacts." *93 F. Supp. 2d at 1089.*

lifting of the embargo on Mexican tuna, Plaintiffs filed an amended complaint along with a motion for a preliminary injunction, seeking to maintain the embargo on Mexican tuna. On April 12, 2000, the court held an evidentiary hearing on the motion for a preliminary injunction. That same day, the United States Customs Service ("Customs") was instructed to lift the embargo against Mexican yellowfin tuna and tuna products. On April 14, 2000, the court denied **[**17]** Plaintiffs' motion, and Plaintiffs did not appeal that decision. *24 C.I.T. , 97 F. Supp. 2d 1197 (2000).*

Plaintiffs now request declaratory relief and a remand to Commerce, but do not renew their request for a continuation of the embargo. For the following reasons, the court denies Plaintiffs' motion.

III. STANDARD OF REVIEW

The scope and standard of review for the Court of International Trade is defined by **[*1343]** *28 U.S.C. § 2640* (1994). Section 2640(e) provides, "in any civil action not specified in this section, the [court] shall review the matter as provided in [*5 U.S.C. § 706].*" It is undisputed that this action was properly brought within the court's jurisdiction under *28 U.S.C. § 1581*(i)(1994). As section 2640 does not specify the standard of review for civil actions filed under *28 U.S.C. § 1581*(i), the court reviews Plaintiffs' motion under *5 U.S.C. § 706* (1994). The court must "hold unlawful and set aside agency action, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance **[**18]** with law . . . ." *5 U.S.C. § 706*(2)(A). The scope of review is limited to the administrative record. *See 28 U.S.C. § 2640*(e); *5 U.S.C. § 706;* USCIT R. 56.1.

It is well-settled that the arbitrary and capricious standard of review is not merely deferential to agency action, but the *most* deferential of the APA standards of review. *See*

In re *Gartside, 203 F.3d 1305, 1312 (Fed. Cir. 2000)* ("Because this [arbitrary and capricious] standard is generally considered to be the most deferential of the APA standards of review, . . . the reviewing court analyzes only whether a rational connection exists between the agency's fact findings and its ultimate action") (citations omitted). "Such deference [to the administering agency] is justified because 'the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones,' *Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 866, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)* and because of the agency's greater familiarity **[**19]** with the ever-changing facts and circumstances surrounding the subjects regulated." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 146 L. Ed. 2d 121, 120 S. Ct. 1291 (2000)* (citing *Rust v. Sullivan, 500 U.S. 173, 187, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991).* An agency action will be found to be arbitrary and capricious if

> the agency has relied upon factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference of view or the product of agency expertise.

Motor Vehicle Mfr. Ass'n v. State Farm Mutual Auto. Ins., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)(citations omitted). The court will uphold an administrative action if the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore*

Gas & Electric v. N.R.D.C., 462 U.S. 87, 105, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983). **[**20]**

To determine whether Commerce has acted in accordance with law in reviewing regulations adopted by an agency within the purview of its legislative delegation and mandate, the court must undertake the two step analysis prescribed by *Chevron*. ("Regulations promulgated pursuant to rulemaking authority granted to administrative agencies are analyzed under the two-step procedure established in the Supreme Court's *Chevron* decision. . . ." *Haggar Apparel Co. v. United States, 222 F.3d 1337, 1340 (Fed. Cir. 2000)).*[f]

First the court must determine whether the statute speaks to the precise question **[*1344]** at issue. *See Chevron, 467 U.S. at 842.* The expressed will or **[**21]** intent of Congress on a specific issue is dispositive. *See Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 233-237, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986).* Second, if the court determines that the statute is silent or ambiguous, the question to be asked is whether the agency's construction of the statute is permissible. *See Chevron, 467 U.S. at 843.* Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu General Ltd. v. United States, 88 F.3d 1034, 1038 (Fed. Cir. 1996).* "We need not bv conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron, 467 U.S. at 843 n. 11*(citations omitted). Rather, the court's "inquiry is confined to the

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[f] The Interim Final Rule is a set of regulations to implement the IDCPA. Included within these regulations are standards by which the Secretary of Commerce is authorized to lift the yellowfin tuna embargo, alter the dolphin-safe labeling standard and establish an enforcement regime. *See 65 Fed. Reg. 30.*

question of whether the agency's interpretation of the statute is 'inconsistent with [the] statutory mandate or ... frustrate[s] the congressional policy underlying a statute'" *Haggar, 222 F.3d at 1340-41* (quoting *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 97, 78 L. Ed. 2d 195, 104 S. Ct. 439 (1983)).* **[**22]** Applying these standards, the court holds that Commerce's *Interim-Final Rule* is not arbitrary, capricious, or not in accordance with law.

IV. DISCUSSION

A. The Interim-Final Rule is in Accordance with Law.

Plaintiffs contend that the *Interim-Final Rule* violates the MMPA, as amended, and is therefore not in accordance with law. First, Defenders claim that Commerce ignored the plain language of the IDCPA by permitting sundown sets upon dolphins upon completion of the backdown procedure a half-hour *after* sundown, instead of *before* sundown, as stated in the IDCPA. Second, Plaintiffs assert that the *Interim-Final Rule's* triggers for imposition of embargoes upon exporting nations are unauthorized and contrary to the statutory language of the IDCPA. Third, according to Defenders, the tracking and verification programs detailed in the *Interim-Final Rule* are defective. Finally, Plaintiffs assert that, contrary to Congressional direction given in the IDCPA, Defendants have refused to implement positive incentives toward reducing dolphin mortality, and have even instituted incentives to maintain dolphin mortality at a certain level.

1. The *Interim-Final* **[**23]** *Rule's* provision on sundown sets is not illegal.

The *Interim-Final Rule* provides that "on every set encircling dolphin, the backdown procedure must be completed no later than one-half hour *after* sundown. . . ." *50*

C.F.R. § 216.24(c)(6)(ii) (emphasis added). The language of the IDCPA provides, however, that Commerce's regulations must include provisions "ensuring that the backdown procedure during sets of purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes *before* sundown..." *16 U.S.C. § 1413*(a)(2)(B)(v) (emphasis added). Defenders claim that the regulation's provision on sundown sets is not in accordance with law, because it is contrary to the express language of the enabling statute. If these were the only two examples of the use of such language, Defenders would have a strong argument. However, that is not the case, and Defenders' argument fails. This case is unique for several reasons. First, the IDCPA is a culmination of a quarter-century of legislative and administrative action, not legislation written **[*1345]** on a blank slate. Second, the relationship between **[**24]** the implementing act and the International Agreement inverts the traditional chronological order. Most international agreements receive congressional approval and implementing authority *after* they have been negotiated. The IDCPA gave *standing authority* to the executive branch to negotiate an international agreement and to issue regulations to implement the agreement, *without returning to Congress* for authorization. Therefore, the court does not analyze this language as merely a conflict between a word in the regulations and a word in the statute. It must look to the various statutory revisions, legislative histories, international agreements, diplomatic declarations and the historical practices of the fishing industry in the ETP.

Before granting *Chevron* deference to an agency regulation, the court must carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable.

> To ascertain whether Congress had an intention on the precise question at issue, we employ the "traditional tools of statutory construction." The first and foremost 'tool' to be used is the statute's text, giving it its plain **[**25]** meaning. Because a statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter.

Timex V.I., Inc. v. United States, 157 F.3d 879, 882 (Fed. Cir. 1998) (citations omitted). Congressional intent is paramount; therefore, a court may disregard obvious mistakes, interpreting the statute so as to correct such mistakes. *See Bohac v. Dep't of Agriculture, 239 F.3d 1334, 1337 (Fed. Cir. 2001).* As the D.C. Circuit stated, "it is obvious, but bears repeating, that in legislative (as in judicial) affairs, allowance must be made for human error and inadvertence." *Citizens to Save Spencer County v. United States Environmental Protection Agency, 195 U.S. App. D.C. 30, 600 F.2d 844, 871-72 (D.C. Cir. 1979).* The law permits courts to correct these mistakes when the "overwhelming evidence" points in one direction and the final language of the act points in another. *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc. 508 U.S. 439, 462, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993).* In such instances the express statutory language standing alone, "shocks common sense." *Crooks v. Harrelson, 282 U.S. 55, 60, 75 L. Ed. 156, 51 S. Ct. 49 (1930).* **[**26]**

The need for overwhelming evidence is particularly acute in this case. The text without the proposed correction is not confusing on its face. *See e.g. U.S. v. American Trucking Assns. 310 U.S. 534, 544, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940).* Nor is there a long history of administrative action assuming the mistake. *Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 171, 106 L. Ed. 2d*

134, 109 S. Ct. 2854 (1989). The change from "after" to "before" maintains the language's clarity, and Defenders are challenging the first administrative action under the Act. Despite these obstacles the government has met the burden in this case.

Although the language of the regulation does appear to conflict with the express statutory language regarding sundown sets, it does not conflict with the intent of Congress. When the language is placed in the context of twenty-five years of legislative enactments and enforcement congressional intent is clear. In many cases courts look to the traditional sources of legislative history for clarification and support. *Griffin v. Oceanic Contractors Inc., 458 U.S. 564, 571, 73 L. Ed. 2d 973, 102 S. Ct. 3245 (1982).* **[**27]** In this case the court has even more than traditional legislative **[*1346]** history to discern legislative intent. Prior legislation that is part of the same legislative scheme to protect dolphins, legislative history, practical considerations and the International Agreement indicate that Congress intended to use the word "after," rather than "before," to establish the cut-off period for sundown sets. Prior to the enactment of the 1988 Amendments to the MMPA, the Committee on Merchant Marine and Fisheries stated that "the back-down procedures would be completed and the net would be close to the seine vessel by 30 minutes *after* sundown. . . ." H.R. Rep. No. 100-970, at 31 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6154, 6172 (emphasis added). In the text of the 1988 Amendments, Congress directed Commerce to "prescribe regulations to ensure that the backdown procedure during sets of the purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than thirty minutes *after* sundown." Pub. L. No. 100-711, § 4, 102 Stat. 4755, 4767 (1988) (emphasis added). Additionally, as Commerce notes, Annex VIII to the Agreement on the IDCP provides that a tuna boat **[**28]**

operating in the Agreement Area must "complete backdown no later than thirty minutes *after* sunset." Annex VIII.3.e (emphasis added). Even the *Proposed Rule* states that "since the purpose of the May 1998 Agreement on the IDCP is to implement the IDCP, NMFS proposes that requiring the backdown procedure to be completed no later than one-half hour after sundown best represents the language of the May 1998 Agreement on the IDCP and the spirit of the IDCP." *64 Fed. Reg. at 31810.*

Employing a 30 minutes after sundown standard also makes more sense when applied in practice. As Amici pointed out, in order to determine what time 30 minutes before sundown is when at sea, a ship would have to know its exact location and then calculate when the sun drops below the horizon. It makes much more sense to determine the cut-off time based on an easily observable phenomenon like sundown itself. *Oral Arg. Tr.* at 85 (October 31, 2001).

Defenders do not convince the court that Congress' use of the word "before" is a true expression of Congress' intent; therefore, the Interim-Final Rule is not contrary to law. In refuting Commerce's defense, Plaintiffs state that Commerce's argument **[**29]** of mistake "ignores the uncontroverted evidence in the record that sundown sets are extremely injurious and dangerous to dolphins,... and that the final legislative language in the Senate was laden with various hard-fought compromises." *Pls.' Br.* at 13. Unfortunately, Plaintiffs cannot point to any specific language in explaining that the clearly-expressed intent to end such sets after sundown in past legislation changed prior to the enactment of the most recent legislative amendment.[8]The *Interim-Final Rule's* provision directing

[8] Plaintiffs proffer the declaration of Senator Barbara Boxer of California, which states, "among the compromises I secured was legislative language pertaining to when sundown sets must be completed. *16 U.S.C. § 1413*(a)(2)(B)(v). Sundown sets are

that backdown procedures be completed 30 minutes after sundown does not conflict with express Congressional intent. Therefore, the court holds that the *Interim-Final Rule's* **[*1347]** provision on sundown sets is in accordance with law.

[30]**

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known to be particularly injurious to dolphins." *Decl. of Barbara Boxer* at P 4. This general statement is not inconsistent with, let alone sufficient to overcome past language, even if the court were permitted to look outside the administrative record for guidance. In any event as this action is brought under USCIT R. 56.1 which provides for judgment on an agency record, Defendant's motion to strike the Declarations of Barbara Boxer and David Phillips on this issue is hereby granted.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 02-1224

DEFENDERS OF WILDLIFE, EARTH ISLAND INSTITUTE, THE HUMANE SOCIETY OF THE UNITED STATES, ENVIRONMENTAL SOLUTIONS INTERNATIONAL, ANIMAL WELFARE INSTITUTE, INTERNATIONAL WILDLIFE COALITION, AMERICAN HUMANE ASSOCIATION, EARTHTRUST, GREENPEACE FOUNDATION, ANIMAL FUND, AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, SIERRA CLUB, SAMUEL LABUDDE, and CRAIG VAN NOTE, Plaintiffs-Appellants, and FUND FOR ANIMALS and DAVID BROWER, Plaintiffs,

v.

WILLIAM T. HOGARTH, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, DONALD L. EVANS, Secretary of Commerce, UNDER SECRETARY OF COMMERCE, Administrator of the National Oceanic and Atmospheric Administration, ASSISTANT SECRETARY, National Oceanic and Atmospheric Administration, SECRETARY OF STATE, SECRETARY OF THE TREASURY, and COMMISSIONER OF THE UNITED STATES CUSTOMS SERVICE, Defendants-Appellees.

Appeals from the United States Court of International Trade

September 25, 2003, Decided

Before GAJARSA, Circuit Judge, with whom NEWMAN, Circuit Judge, joins, dissents in a separate opinion.**[*1333]**

ON PETITION FOR REHEARING EN BANC

ORDER

A petition for rehearing en banc was filed by the Appellants, and a response thereto was invited by the court and filed by the Appellees. This matter was referred first as a petition for rehearing to the merits panel that heard the appeal. Thereafter, **[**2]** the petition for rehearing en banc, and response were referred to the circuit judges who are authorized to request a poll whether to rehear the appeal **[*1334]** en banc. A poll was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for rehearing is denied.

(2) The petition for rehearing en banc is denied.

GAJARSA, Circuit Judge, with whom NEWMAN, Circuit Judge, joins, dissents in a separate opinion.

The mandate of the court will issue on October 2, 2003.

DISSENTBY: GAJARSA; NEWMAN

DISSENT: GAJARSA, Circuit Judge, with whom NEWMAN, Circuit Judge, joins, dissenting from the order denying rehearing en banc.

I must respectfully dissent from the denial of the petition for en banc consideration of this case. The panel opinion,

Defenders of Wildlife v. Hogarth, 330 F.3d 1358 (Fed. Cir. 2003), erroneously permits the Secretary of Commerce to trump a duly enacted statute with a regulation. The panel majority does not dispute the fact that *section 1413(a)(2)(B) of the International Dolphin Conservation Program Act*, Pub. L. No. 105-42, 111 Stat. 1122 ("IDCPA" or "the Act") **[**3]** (codified as amended at scattered sections of 16 U.S.C.), is clear on its face. See *Defenders of Wildlife, 330 F.3d at 1367* ("The IDCPA clearly requires that the backdown procedure be completed one-half hour before sunset."). Despite the panel's unanimous agreement on meaning, the majority allows the Secretary to abrogate the section by regulation. The supremacy of administrative over legislative authority is a concept foreign to our structure of government. The panel majority's construction of the IDCPA authorizing such an abrogation is therefore unconstitutional and should be so declared.

In *Clinton v. New York, 524 U.S. 417, 141 L. Ed. 2d 393, 118 S. Ct. 2091 (1998)*, the Supreme Court found the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), unconstitutional. The Line Item Veto Act permitted the President to cancel portions of enacted laws through prescribed guidelines. Despite the clear intentions of Congress to grant the President this authority, the Court found the delegation prohibited by the bicameralism and presentment requirements of *Article I, § 7 of the Constitution*. According to the Court, the canceling of any provision **[**4]** of a validly enacted law was effectively a repeal of that provision, and "'Repeal of statutes, no less than enactment, must conform with Art. I.'" *Clinton, 524 U.S. at 438* (citing *INS v. Chadha, 462 U.S. 919, 954, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983)*). The Line Item Veto Act, which gave the President "unilateral power to change the text of duly enacted statutes," *id. at 447*, did not satisfy those constitutional requirements. While modifications of the lawmaking process are possible, the Court explained, they may come only through the amendment procedures described in

Article V of the Constitution. Id. at 449.

Returning to the facts in this case, the IDCPA became law on August 15, 1997. The IDCPA implemented provisions of the Declaration of Panama, a nonbinding executive agreement entered into by the United States and eleven other countries ("the Program"). The IDCPA does not in itself apply to fishing practices. Instead, *section 1413* directs the Secretary of Commerce to promulgate regulations implementing the Act's provisions. In guidance, the IDCPA further enumerates seven elements comprising the minimum permissible regulatory scheme. **[**5]** See *§ 1413(a)(2)(B)* ("Regulations implemented under this section shall **[*1335]** include provisions . . . ." (emphasis added)). The fifth of these elements states that the backdown procedures of fishing vessels on the sets of their purse seine nets must be completed "no later than 30 minutes before sundown." *§ 1413(a)(2)(B)(v)* (emphasis added).

In Defenders of Wildlife, a divided panel of this court upheld one of the Secretary's regulations permitting completion of backdown procedures up to one half-hour after sundown. *330 F.3d at 1367*; *50 C.F.R. § 216.24(c)(6)(iii)*. The majority reached this result by reading *section 1413(a)(2)(C)*, which allows the Secretary to "make such adjustments as may be appropriate" to subparagraph *(B)*, as empowering the Secretary to alter the statutory language of subparagraph *(B)*. This reading of *section 1413(a)(2)(C)*, though a tenable construction based on the language of the statute, runs squarely into the prohibition of Clinton.

The Secretary's regulation contravenes the plain text of subparagraph *(B)*, which instructs the Secretary on the minimum regulatory requirements of the IDCPA. Following the **[**6]** promulgation of the regulation at issue, and this court's decision upholding it, fishing vessels may now delay backdown procedures until one-half hour after sundown. The mandate of subparagraph *(B)(v)* has effectively disappeared,

consumed by subparagraph *(C)*. Following this logic, there is no reason that any provision of subparagraph *(B)* should withstand regulatory amendment. The contents of subparagraph *(B)*, however, remain a part of the Act. Having been placed there by Congress, only Congress may remove them. In denying en banc review, we leave in place a decision approving the triumph of regulation over legislation.

A regulation eviscerating the legal force of the backdown procedures in subparagraph *(B)* is no less an amendment to the IDCPA than the striking of clauses found unconstitutional in Clinton. Like the Balanced Budget Act of 1997 in Clinton, the IDCPA was: (1) "approved by a majority of the Members of the House of Representatives" in a form identical to the enacted statute; (2) approved in the same form by the Senate; and (3) signed into law by the President. *Clinton, 524 U.S. at 448*. Upon completion of these procedures, the contents of the [**7] IDCPA in their entirety became law. *Art. I, § 7*. Also as with the Balanced Budget Act, a provision of the IDCPA no longer carries legal force due exclusively to executive action. By my understanding of the Constitution and the Supreme Court's holding in Clinton, this result may only be achieved through the procedures outlined in *Article 1, § 7*. The apparent authorization of a contrary result by subparagraph *(C)* is of no consequence. *Clinton, 524 U.S. at 446-47*.

Much as Congress is forbidden to amend the Constitution with ordinary legislation, an executive agency may not amend legislation with regulation. This is the import of *Article I, § 7* and of Clinton. The court's denial of en banc review today permits a new form of uneasy and illegitimate partnership between Congress and executive agencies that has previously been rejected by the United States Supreme Court. I therefore respectfully dissent.

APPENDIX D

The Constitution of the United States

Article. I., Section 7, Clause 2

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.

Article. VI., Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.

APPENDIX E

INTERNATIONAL DOLPHIN CONSERVATION PROGRAM ACT

PUBLIC LAW 105–42—AUG. 15, 1997
105th Congress

111 STAT. 1122 - 1139

An Act

To amend the Marine Mammal Protection Act of 1972 to support the International Dolphin Conservation Program in the eastern tropical Pacific Ocean, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the ''International Dolphin Conservation Program Act''.
(b) REFERENCES TO MARINE MAMMAL PROTECTION ACT.— Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.).

SEC. 2. PURPOSES AND FINDINGS.

(a) PURPOSES.—The purposes of this Act are —

(1) to give effect to the Declaration of Panama, signed October 4, 1995, by the Governments of Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, the United States of America, Vanuatu, and Venezuela, including the establishment of the International Dolphin Conservation Program, relating to the protection of dolphins and other species, and the conservation and management of tuna in the eastern tropical Pacific Ocean;

(2) to recognize that nations fishing for tuna in the eastern tropical Pacific Ocean have achieved significant reductions in dolphin mortality associated with that fishery; and

(3) to eliminate the ban on imports of tuna from those nations that are in compliance with the International Dolphin Conservation Program.

(b) FINDINGS.— The Congress finds that —

(1) the nations that fish for tuna in the eastern tropical Pacific Ocean have achieved significant reductions in dolphin mortality associated with the purse seine fishery from hundreds of thousands annually to fewer than 5,000 annually;

(2) the provisions of the Marine Mammal Protection Act of 1972 that impose a ban on imports from nations that fish for tuna in the eastern tropical Pacific Ocean have served as an incentive to reduce dolphin mortalities;

(3) tuna canners and processors of the United States have led the canning and processing industry in promoting a dolphin-safe tuna market; and

(4) 12 signatory nations to the Declaration of Panama, including the United States, agreed under that Declaration to require that the total annual dolphin mortality in the purse seine fishery for yellowfin tuna in the eastern tropical Pacific Ocean not exceed 5,000 animals, with the objective of progressively reducing dolphin mortality to a level approaching zero through the

setting of annual limits and with the goal of eliminating dolphin mortality.

SEC. 3. DEFINITIONS.

Section 3 (16 U.S.C. 1362) is amended by adding at the end the following new paragraphs:

''(28) The term 'International Dolphin Conservation Program' means the international program established by the agreement signed in LaJolla, California, in June, 1992, as formalized, modified, and enhanced in accordance with the Declaration of Panama.

''(29) The term 'Declaration of Panama' means the declaration signed in Panama City, Republic of Panama, on October 4, 1995.''.

SEC. 4. AMENDMENTS TO TITLE I.

(a) EXCEPTIONS TO MORATORIUM.— Section 101(a)(2) (16 U.S.C.1371(a)(2)) is amended —

(1) by inserting after the first sentence ''Such authorizations may be granted under title III with respect to purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean, subject to regulations prescribed under that title by the Secretary without regard to section 103.''; and

(2) by striking the semicolon in the second sentence and all that follows through ''practicable''.

(b) DOCUMENTATION REQUIRED.— Section 101(a)(2) (16 U.S.C.1371(a)(2)) is further amended —

(1) by striking subparagraph (B) and inserting the following:

''(B) in the case of yellowfin tuna harvested with purse seine nets in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States,

shall require that the government of the exporting nation provide documentary evidence that—

''(i)(I) the tuna or products therefrom were not banned from importation under this paragraph before the effective date of section 4 of the International Dolphin Conservation Program Act; or

''(II) the tuna or products therefrom were harvested after the effective date of section 4 of the International Dolphin Conservation Program Act by vessels of a nation which participates in the International Dolphin Conservation Program, and such harvesting nation is either a member of the Inter-American Tropical Tuna Commission or has initiated (and within 6 months thereafter completed) all steps required of applicant nations, in accordance with article V, paragraph 3 of the Convention establishing the Inter-American Tropical Tuna Commission, to become a member of that organization;

''(ii) such nation is meeting the obligations of the International Dolphin Conservation Program and the obligations of membership in the Inter-American Tropical Tuna Commission, including all financial obligations; and

''(iii) the total dolphin mortality limits, and perstock per-year dolphin mortality limits permitted for that nation's vessels under the International Dolphin Conservation Program do not exceed the limits determined for 1997, or for any year thereafter, consistent with the objective of progressively reducing dolphin mortality to a level approaching zero through the setting of annual limits and the goal of eliminating dolphin mortality, and requirements of the International Dolphin Conservation Program;'';

(2) by redesignating subparagraphs (C), (D), and (E) as subparagraphs (D), (E), and (F), respectively;

(3) by inserting after subparagraph (B) the following:

''(C) shall not accept such documentary evidence if—

''(i) the government of the harvesting nation does not provide directly or authorize the Inter-American Tropical Tuna Commission to release complete and accurate information to the Secretary in a timely manner—

''(I) to allow determination of compliance with the International Dolphin Conservation Program; and

''(II) for the purposes of tracking and verifying compliance with the minimum requirements established by the Secretary in regulations promulgated under subsection (f) of the Dolphin Protection Consumer Information Act (16 U.S.C. 1385(f)); or

''(ii) after taking into consideration such information, findings of the Inter-American Tropical Tuna Commission, and any other relevant information, including information that a nation is consistently failing to take enforcement actions on violations which diminish the effectiveness of the International Dolphin Conservation Program, the Secretary, in consultation with the Secretary of State, finds that the harvesting nation is not in compliance with the International Dolphin Conservation Program.''; and

(4) by striking ''subparagraph (E)'' in the matter after subparagraph (F), as redesignated by paragraph (2) of this subsection, and inserting ''subparagraph (F)''.

(c) CERTAIN INCIDENTAL TAKINGS.—Section 101 (16 U.S.C. 1371)is further amended by adding at the end the following new subsection:

''(e) ACT NOT TO APPLY TO INCIDENTAL TAKINGS BY UNITED STATES CITIZENS EMPLOYED ON FOREIGN VESSELS OUTSIDE THE UNITED STATES EEZ.—The provisions of this Act shall not apply to a citizen of the United States who

incidentally takes any marine mammal during fishing operations outside the United States exclusive economic zone (as defined in section 3 of the Magnuson Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)) when employed on a foreign fishing vessel of a harvesting nation which is in compliance with the International Dolphin Conservation Program.''.

(d) PERMITS.—Section 104(h) (16 U.S.C. 1374(h)) is amended to read as follows:

''(h) GENERAL PERMITS.—

''(1) Consistent with the regulations prescribed pursuant to section 103 of this title and to the requirements of section 101 of this title, the Secretary may issue an annual permit to a United States purse seine fishing vessel for the taking of such marine mammals, and shall issue regulations to cover the use of any such annual permits.

''(2) Such annual permits for the incidental taking of marine mammals in the course of commercial purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean shall be governed by section 306 of this Act, subject to the regulations issued pursuant to section 303 of this Act.''.

(e) INTERNATIONAL NEGOTIATIONS.—Section 108(a)(2) (16 U.S.C. 1378(a)(2)) is amended—

(1) by striking ''and'' at the end of subparagraph (A);

(2) by inserting after subparagraph (B) the following:

''(C) negotiations to revise the Convention for the Establishment of an Inter-American Tropical Tuna Commission (1 U.S.T. 230; TIAS 2044) which will incorporate —

''(i) the conservation and management provisions agreed to by the nations which have signed the Declaration of Panama and in the Straddling Fish Stocks and Highly Migratory Fish Stocks

Agreement, as opened for signature on December 4, 1995; and

''(ii) a revised schedule of annual contributions to the expenses of the Inter American Tropical Tuna Commission that is equitable to participating nations; and

''(D) discussions with those countries participating, or likely to participate, in the International Dolphin Conservation Program, for the purpose of identifying sources of funds needed for research and other measures promoting effective protection of dolphins, other marine species, and the marine ecosystem;''.

(f) RESEARCH GRANTS.—Section 110(a) (16 U.S.C. 1380(a)) is amended—

(1) by striking ''(1)'' in paragraph (1); and

(2) by striking paragraph (2).

SEC. 5. AMENDMENTS TO DOLPHIN PROTECTION CONSUMER INFORMATION ACT.

(a) LABELING STANDARD.—Subsection (d) of the Dolphin Protection Consumer Information Act (16 U.S.C. 1385(d)) is amended to read as follows:

''(d) LABELING STANDARD.—

''(1) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term 'dolphin safe' or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins if the product contains tuna harvested —

''(A) on the high seas by a vessel engaged in driftnet fishing;

''(B) outside the eastern tropical Pacific Ocean by a vessel using purse seine nets—

''(i) in a fishery in which the Secretary has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the eastern tropical Pacific Ocean), unless such product is accompanied by a written statement, executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught; or

''(ii) in any other fishery (other than a fishery described in subparagraph (D)) unless the product is accompanied by a written statement executed by the captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested;

''(C) in the eastern tropical Pacific Ocean by a vessel using a purse seine net unless the tuna meet the requirements for being considered dolphin safe under paragraph (2); or

''(D) by a vessel in a fishery other than one described in subparagraph (A), (B), or (C) that is identified by the Secretary as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that no dolphins were

killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Secretary determines that such an observer statement is necessary.

''(2) For purposes of paragraph (1)(C), a tuna product that contains tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets is dolphin safe if —

''(A) the vessel is of a type and size that the Secretary has determined, consistent with the International Dolphin Conservation Program, is not capable of deploying its purse seine nets on or to encircle dolphins; or

''(B)(i) the product is accompanied by a written statement executed by the captain providing the certification required under subsection (h);

''(ii) the product is accompanied by a written statement executed by—

''(I) the Secretary or the Secretary's designee;

''(II) a representative of the Inter-American Tropical Tuna Commission; or

''(III) an authorized representative of a participating nation whose national program meets the requirements of the International Dolphin Conservation Program, which states that there was an observer approved by the International Dolphin Conservation Program on board the vessel during the entire trip and that such observer provided the certification required under subsection (h); and

''(iii) the statements referred to in clauses (i) and (ii) are endorsed in writing by each exporter, importer, and processor of the product; and

''(C) the written statements and endorsements referred to in subparagraph (B) comply with regulations promulgated by the Secretary which

provide for the verification of tuna products as dolphin safe.

''(3)(A) The Secretary of Commerce shall develop an official mark that may be used to label tuna products as dolphin safe in accordance with this Act.

''(B) A tuna product that bears the dolphin safe mark developed under subparagraph (A) shall not bear any other label or mark that refers to dolphins, porpoises, or marine mammals.

''(C) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to label a tuna product with any label or mark that refers to dolphins, porpoises, or marine mammals other than the mark developed under subparagraph (A) unless—

''(i) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught;

''(ii) the label is supported by a tracking and verification program which is comparable in effectiveness to the program established under subsection (f); and

''(iii) the label complies with all applicable labeling, marketing, and advertising laws and regulations of the Federal Trade Commission, including any guidelines for environmental labeling.

''(D) If the Secretary determines that the use of a label referred to in subparagraph (C) is substantially undermining the conservation goals of the International Dolphin Conservation Program, the Secretary shall report that determination to the United States Senate Committee on Commerce, Science, and Transportation and the United States House of Representatives Committees on Resources and on Commerce, along with recommendations to correct such problems.

''(E) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) willingly and knowingly

to use a label referred to in subparagraph (C) in a campaign or effort to mislead or deceive consumers about the level of protection afforded dolphins under the International Dolphin Conservation Program.''.

(b) TRACKING REGULATIONS.—Subsection (f) of the Dolphin Protection Consumer Information Act (16 U.S.C. 1385(f)) is amended to read as follows:

''(f) REGULATIONS.—The Secretary, in consultation with the Secretary of the Treasury, shall issue regulations to implement this Act, including regulations to establish a domestic tracking and verification program that provides for the effective tracking of tuna labeled under subsection (d). In the development of these regulations, the Secretary shall establish appropriate procedures for ensuring the confidentiality of proprietary information the submission of which is voluntary or mandatory. The regulations shall address each of the following items:

''(1) The use of weight calculation for purposes of tracking tuna caught, landed, processed, and exported.

''(2) Additional measures to enhance current observer coverage, including the establishment of criteria for training, and for improving monitoring and reporting capabilities and procedures.

''(3) The designation of well location, procedures for sealing holds, procedures for monitoring and certifying both above and below deck, or through equally effective methods, the tracking and verification of tuna labeled under subsection (d).

''(4) The reporting, receipt, and database storage of radio and facsimile transmittals from fishing vessels containing information related to the tracking and verification of tuna, and the definition of set.

''(5) The shore-based verification and tracking throughout the fishing, transshipment, and canning

process by means of Inter-American Tropical Tuna Commission trip records or otherwise.

''(6) The use of periodic audits and spot checks for caught, landed, and processed tuna products labeled in accordance with subsection (d).

''(7) The provision of timely access to data required under this subsection by the Secretary from harvesting nations to undertake the actions required in paragraph (6) of this paragraph.

The Secretary may make such adjustments as may be appropriate to the regulations promulgated under this subsection to implement an international tracking and verification program that meets or exceeds the minimum requirements established by the Secretary under this subsection.''.

(c) FINDINGS CONCERNING IMPACT ON DEPLETED STOCKS.—The Dolphin Protection Consumer Information Act (16 U.S.C. 1385) is amended by striking subsections (g), (h), and (i) and inserting the following:

''(g) SECRETARIAL FINDINGS.—

(1) Between March 1, 1999, and March 31, 1999, the Secretary shall, on the basis of the research conducted before March 1, 1999, under section 304(a) of the Marine Mammal Protection Act of 1972, information obtained under the International Dolphin Conservation Program, and any other relevant information, make an initial finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean. The initial finding shall be published immediately in the Federal Register and shall become effective upon a subsequent date determined by the Secretary.

''(2) Between July 1, 2001, and December 31, 2002, the Secretary shall, on the basis of the completed study conducted under section 304(a) of the Marine Mammal

Protection Act of 1972, information obtained under the International Dolphin Conservation Program, and any other relevant information, make a finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean. The finding shall be published immediately in the Federal Register and shall become effective upon a subsequent date determined by the Secretary.

''(h) CERTIFICATION BY CAPTAIN AND OBSERVER.—

''(1) Unless otherwise required by paragraph (2), the certification by the captain under subsection (d)(2)(B)(i) and the certification provided by the observer as specified in subsection (d)(2)(B)(ii) shall be that no dolphins were killed or seriously injured during the sets in which the tuna were caught.

''(2) The certification by the captain under subsection (d)(2)(B)(i) and the certification provided by the observer as specified under subsection (d)(2)(B)(ii) shall be that no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured during the sets in which the tuna were caught, if the tuna were caught on a trip commencing —

''(A) before the effective date of the initial finding by the Secretary under subsection (g)(1);

''(B) after the effective date of such initial finding and before the effective date of the finding of the Secretary under subsection (g)(2), where the initial finding is that the intentional deployment on or encirclement of dolphins is having a significant adverse impact on any depleted dolphin stock; or

''(C) after the effective date of the finding under subsection (g)(2), where such finding is that the intentional deployment on or encirclement of dolphins is having a significant adverse impact on any such depleted stock.''.

SEC. 6. AMENDMENTS TO TITLE III.

(a) CHANGE OF TITLE HEADING.—The heading of title III is amended to read as follows:

''TITLE III — INTERNATIONAL DOLPHIN CONSERVATION PROGRAM''.

(b) ADDITIONAL FINDINGS.— Section 301 (16 U.S.C. 1411) is amended —

(1) by striking paragraph (4) of subsection (a) and inserting the following:

''(4) Nations harvesting yellowfin tuna in the eastern tropical Pacific Ocean have demonstrated their willingness to participate in appropriate multilateral agreements to reduce dolphin mortality progressively to a level approaching zero through the setting of annual limits, with the goal of eliminating dolphin mortality in that fishery. Recognition of the International Dolphin Conservation Program will assure that the existing trend of reduced dolphin mortality continues; that individual stocks of dolphins are adequately protected; and that the goal of eliminating all dolphin mortality continues to be a priority.''; and

(2) by striking paragraphs (2) and (3) of subsection (b) and inserting the following:

''(2) support the International Dolphin Conservation Program and efforts within the Program to reduce, with the goal of eliminating, the mortality referred to in paragraph (1); ''(3) ensure that the market of the

United States does not act as an incentive to the harvest of tuna caught with driftnets or caught by purse seine vessels in the eastern tropical Pacific Ocean not operating in compliance with the International Dolphin Conservation Program;''.

(c) Title III (16 U.S.C. 1411 et seq.) is amended by striking sections 302 through 306 (16 U.S.C. 1412 through 1416) and inserting the following:

''SEC. 302. INTERNATIONAL DOLPHIN CONSERVATION PROGRAM.

''The Secretary of State, in consultation with the Secretary, shall seek to secure a binding international agreement to establish an International Dolphin Conservation Program that requires—

''(1) that the total annual dolphin mortality in the purse seine fishery for yellowfin tuna in the eastern tropical Pacific Ocean shall not exceed 5,000 animals with a commitment and objective to progressively reduce dolphin mortality to a level approaching zero through the setting of annual limits;

''(2) the establishment of a per-stock per-year dolphin mortality limit, to be in effect through calendar year 2000, at a level between 0.2 percent and 0.1 percent of the minimum population estimate, as calculated, revised, or approved by the Secretary;

''(3) the establishment of a per-stock per-year dolphin mortality limit, beginning with the calendar year 2001, at a level less than or equal to 0.1 percent of the minimum population estimate as calculated, revised, or approved by the Secretary;

''(4) that if a dolphin mortality limit is exceeded under–

''(A) paragraph (1), all sets on dolphins shall cease for the applicable fishing year; and ''(B) paragraph (2) or (3), all sets on the stocks covered under

paragraph (2) or (3) and any mixed schools that contain any of those stocks shall cease for the applicable fishing year;

''(5) a scientific review and assessment to be conducted in calendar year 1998 to —

''(A) assess progress in meeting the objectives set for calendar year 2000 under paragraph (2); and

''(B) as appropriate, consider recommendations for meeting these objectives;

''(6) a scientific review and assessment to be conducted in calendar year 2000 —

''(A) to review the stocks covered under paragraph (3); and

''(B) as appropriate to consider recommendations to further the objectives set under that paragraph;

''(7) the establishment of a per vessel maximum annual dolphin mortality limit consistent with the established per year mortality limits, as determined under paragraphs (1) through (3); and

''(8) the provision of a system of incentives to vessel captains to continue to reduce dolphin mortality, with the goal of eliminating dolphin mortality.

''SEC. 303. REGULATORY AUTHORITY OF THE SECRETARY.

''(a) REGULATIONS.—

''(1) The Secretary shall issue regulations, and revise those regulations as may be appropriate, to implement the International Dolphin Conservation Program.

''(2)(A) The Secretary shall issue regulations to authorize and govern the taking of marine mammals in the eastern tropical Pacific Ocean, including any species of marine mammal designated as depleted under this Act but not listed as endangered or threatened under the Endangered Species Act (16 U.S.C. 1531 et seq.), by

vessels of the United States participating in the International Dolphin Conservation Program.

''(B) Regulations issued under this section shall include provisions —

''(i) requiring observers on each vessel;

''(ii) requiring use of the backdown procedure or other procedures equally or more effective in avoiding mortality of, or serious injury to, marine mammals in fishing operations;

''(iii) prohibiting intentional sets on stocks and schools in accordance with the International Dolphin Conservation Program;

''(iv) requiring the use of special equipment, including dolphin safety panels in nets, monitoring devices as identified by the International Dolphin Conservation Program to detect unsafe fishing conditions that may cause high incidental dolphin mortality before nets are deployed by a tuna vessel, operable rafts, speedboats with towing bridles, floodlights in operable condition, and diving masks and snorkels;

''(v) ensuring that the backdown procedure during sets of purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes before sundown;

''(vi) banning the use of explosive devices in all purse seine operations;

''(vii) establishing per vessel maximum annual dolphin mortality limits, total dolphin mortality limits and per-stock per-year mortality limits in accordance with the International Dolphin Conservation Program;

''(viii) preventing the making of intentional sets on dolphins after reaching either the vessel maximum annual dolphin mortality limits, total dolphin

mortality limits, or per-stock per-year mortality limits;

''(ix) preventing the fishing on dolphins by a vessel without an assigned vessel dolphin mortality limit;

''(x) allowing for the authorization and conduct of experimental fishing operations, under such terms and conditions as the Secretary may prescribe, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce or eliminate dolphin mortality or serious injury do not require the encirclement of dolphins in the course of commercial yellowfin tuna fishing;

''(xi) authorizing fishing within the area covered by the International Dolphin Conservation Program by vessels of the United States without the use of special equipment or nets if the vessel takes an observer and does not intentionally deploy nets on, or encircle, dolphins, under such terms and conditions as the Secretary may prescribe; and

''(xii) containing such other restrictions and requirements as the Secretary determines are necessary to implement the International Dolphin Conservation Program with respect to vessels of the United States.

''(C) ADJUSTMENTS TO REQUIREMENTS. — The Secretary may make such adjustments as may be appropriate to requirements of subparagraph (B) that pertain to fishing gear, vessel equipment, and fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program.

''(b) CONSULTATION. — In developing any regulation under this section, the Secretary shall consult with the Secretary of State, the Marine Mammal Commission, and the United States Commissioners to the Inter-American Tropical Tuna Commission appointed under section 3 of the Tuna Conventions Act of 1950 (16 U.S.C. 952).

''(c) EMERGENCY REGULATIONS.—

''(1) If the Secretary determines, on the basis of the best scientific information available (including research conducted under section 304 and information obtained under the International Dolphin Conservation Program) that the incidental mortality and serious injury of marine mammals authorized under this title is having, or is likely to have, a significant adverse impact on a marine mammal stock or species, the Secretary shall—

''(A) notify the Inter-American Tropical Tuna Commission of his or her determination, along with recommendations to the Commission as to actions necessary to reduce incidental mortality and serious injury and mitigate such adverse impact; and

''(B) prescribe emergency regulations to reduce incidental mortality and serious injury and mitigate such adverse impact.

''(2) Before taking action under subparagraph (A) or (B) of paragraph (1), the Secretary shall consult with the Secretary of State, the Marine Mammal Commission, and the United States Commissioners to the Inter-American Tropical Tuna Commission.

''(3) Emergency regulations prescribed under this subsection —

''(A) shall be published in the Federal Register, together with an explanation thereof;

''(B) shall remain in effect for the duration of the applicable fishing year; and

''(C) may be terminated by the Secretary at an earlier date by publication in the Federal Register of a notice of termination if the Secretary determines that the reasons for the emergency action no longer exist.

''(4) If the Secretary finds that the incidental mortality and serious injury of marine mammals in the yellowfin tuna fishery in the eastern tropical Pacific Ocean is continuing to have a significant adverse impact on a

stock or species, the Secretary may extend the emergency regulations for such additional periods as may be necessary.

''(5) Within 120 days after the Secretary notifies the United States Commissioners to the Inter-American Tropical Tuna Commission of the Secretary's determination under paragraph (1)(A), the United States Commissioners shall call for a special meeting of the Commission to address the actions necessary to reduce incidental mortality and serious injury and mitigate the adverse impact which resulted in the determination. The Commissioners shall report the results of the special meeting in writing to the Secretary and to the Secretary of State. In their report, the Commissioners shall—

''(A) include a description of the actions taken by the harvesting nations or under the International Dolphin Conservation Program to reduce the incidental mortality and serious injury and measures to mitigate the adverse impact on the marine mammal species or stock;

''(B) indicate whether, in their judgment, the actions taken address the problem adequately; and

''(C) if they indicate that the actions taken do not address the problem adequately, include recommendations of such additional action to be taken as may be necessary.

''SEC. 304. RESEARCH.

''(a) REQUIRED RESEARCH.—

''(1) IN GENERAL.—The Secretary shall, in consultation with the Marine Mammal Commission and the Inter-American Tropical Tuna Commission, conduct a study of the effect of intentional encirclement (including chase) on dolphins and dolphin stocks incidentally taken in the course of purse seine fishing for

yellowfin tuna in the eastern tropical Pacific Ocean. The study, which shall commence on October 1, 1997, shall consist of abundance surveys as described in paragraph (2) and stress studies as described in paragraph (3), and shall address the question of whether such encirclement is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean.

''(2) POPULATION ABUNDANCE SURVEYS.—The abundance surveys under this subsection shall survey the abundance of such depleted stocks and shall be conducted during each of the calendar years 1998, 1999, and 2000.

''(3) STRESS STUDIES. — The stress studies under this subsection shall include —

''(A) a review of relevant stress-related research and a 3-year series of necropsy samples from dolphins obtained by commercial vessels;

''(B) a 1-year review of relevant historical demographic and biological data related to dolphins and dolphin stocks referred to in paragraph (1); and

''(C) an experiment involving the repeated chasing and capturing of dolphins by means of intentional encirclement.

''(4) REPORT.—No later than 90 days after publishing the finding under subsection (g)(2) of the Dolphin Protection Consumer Information Act, the Secretary shall complete and submit a report containing the results of the research described in this subsection to the United States Senate Committee on Commerce, Science, and Transportation and the United States House of Representatives Committees on Resources and on Commerce, and to the Inter-American Tropical Tuna Commission.

''(b) OTHER RESEARCH.—

''(1) IN GENERAL.—In addition to conducting the research described in subsection (a), the Secretary shall,

in consultation with the Marine Mammal Commission and in cooperation with the nations participating in the International Dolphin Conservation Program and the Inter-American Tropical Tuna Commission, undertake or support appropriate scientific research to further the goals of the International Dolphin Conservation Program.

''(2) SPECIFIC AREAS OF RESEARCH.—Research carried out under paragraph (1) may include—

''(A) projects to devise cost-effective fishing methods and gear so as to reduce, with the goal of eliminating, the incidental mortality and serious injury of marine mammals in connection with commercial purse seine fishing in the eastern tropical Pacific Ocean;

''(B) projects to develop cost-effective methods of fishing for mature yellowfin tuna without setting nets on dolphins or other marine mammals;

''(C) projects to carry out stock assessments for those marine mammal species and marine mammal stocks taken in the purse seine fishery for yellowfin tuna in the eastern tropical Pacific Ocean, including species or stocks not within waters under the jurisdiction of the United States; and

''(D) projects to determine the extent to which the incidental take of nontarget species, including juvenile tuna, occurs in the course of purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean, the geographic location of the incidental take, and the impact of that incidental take on tuna stocks and nontarget species.

''(c) AUTHORIZATION OF APPROPRIATIONS.—

''(1) There are authorized to be appropriated to the Secretary the following amounts, to be used by the Secretary to carry out the research described in subsection (a):

''(A) $4,000,000 for fiscal year 1998.

''(B) $3,000,000 for fiscal year 1999.
''(C) $4,000,000 for fiscal year 2000.
''(D) $1,000,000 for fiscal year 2001.
''(2) In addition to the amount authorized to be appropriated under paragraph (1), there are authorized to be appropriated to the Secretary for carrying out this section $3,000,000 for each of the fiscal years 1998, 1999, 2000, and 2001.

''SEC. 305. REPORTS BY THE SECRETARY.

''Notwithstanding section 103(f), the Secretary shall submit annual reports to the Congress which include—
''(1) results of research conducted pursuant to section 304;
''(2) a description of the status and trends of stocks of tuna;
''(3) a description of the efforts to assess, avoid, reduce, and minimize the bycatch of juvenile yellowfin tuna and bycatch of nontarget species;
''(4) a description of the activities of the International Dolphin Conservation Program and of the efforts of the United States in support of the Program's goals and objectives, including the protection of dolphin stocks in the eastern tropical Pacific Ocean, and an assessment of the effectiveness of the Program;
''(5) actions taken by the Secretary under section 101(a)(2)(B) and section 101(d);
''(6) copies of any relevant resolutions and decisions of the Inter-American Tropical Tuna Commission, and any regulations promulgated by the Secretary under this title; and
''(7) any other information deemed relevant by the Secretary.

"SEC. 306. PERMITS.

"(a) IN GENERAL. —

"(1) Consistent with the regulations issued pursuant to section 303, the Secretary shall issue a permit to a vessel of the United States authorizing participation in the International Dolphin Conservation Program and may require a permit for the person actually in charge of and controlling the fishing operation of the vessel. The Secretary shall prescribe such procedures as are necessary to carry out this subsection, including requiring the submission of —

"(A) the name and official number or other identification of each fishing vessel for which a permit is sought, together with the name and address of the owner thereof; and

"(B) the tonnage, hold capacity, speed, processing equipment, and type and quantity of gear, including an inventory of special equipment required under section 303, with respect to each vessel.

"(2) The Secretary is authorized to charge a fee for granting an authorization and issuing a permit under this section. The level of fees charged under this paragraph may not exceed the administrative cost incurred in granting an authorization and issuing a permit. Fees collected under this paragraph shall be available to the Under Secretary of Commerce for Oceans and Atmosphere for expenses incurred in granting authorizations and issuing permits under this section.

"(3) After the effective date of the International Dolphin Conservation Program Act, no vessel of the United States shall operate in the yellowfin tuna fishery in the eastern tropical Pacific Ocean without a valid permit issued under this section.

"(b) PERMIT SANCTIONS.—

"(1) In any case in which—

''(A) a vessel for which a permit has been issued under this section has been used in the commission of an act prohibited under section 307;

''(B) the owner or operator of any such vessel or any other person who has applied for or been issued a permit under this section has acted in violation of section 307; or

''(C) any civil penalty or criminal fine imposed on a vessel, owner or operator of a vessel, or other person who has applied for or been issued a permit under this section has not been paid or is overdue, the Secretary may —

''(i) revoke any permit with respect to such vessel, with or without prejudice to the issuance of subsequent permits;

''(ii) suspend such permit for a period of time considered by the Secretary to be appropriate;

''(iii) deny such permit; or

''(iv) impose additional conditions or restrictions on any permit issued to, or applied for by, any such vessel or person under this section.

''(2) In imposing a sanction under this subsection, the Secretary shall take into account—

''(A) the nature, circumstances, extent, and gravity of the prohibited acts for which the sanction is imposed; and

''(B) with respect to the violator, the degree of culpability, any history of prior offenses, and other such matters as justice requires.

''(3) Transfer of ownership of a vessel, by sale or otherwise, shall not extinguish any permit sanction that is in effect or is pending at the time of transfer of ownership. Before executing the transfer of ownership of a vessel, by sale or otherwise, the owner shall disclose in writing to the prospective transferee the existence of any

permit sanction that will be in effect or pending with respect to the vessel at the time of transfer.

''(4) In the case of any permit that is suspended for the failure to pay a civil penalty or criminal fine, the Secretary shall reinstate the permit upon payment of the penalty or fine and interest thereon at the prevailing rate.

''(5) No sanctions shall be imposed under this section unless there has been a prior opportunity for a hearing on the facts underlying the violation for which the sanction is imposed, either in conjunction with a civil penalty proceeding under this title or otherwise.''

(d) Section 307 (16 U.S.C. 1417) is amended —

(1) by striking paragraphs (1), (2), and (3) of subsection (a) and inserting the following:

''(1) for any person to sell, purchase, offer for sale, transport, or ship, in the United States, any tuna or tuna product unless the tuna or tuna product is either dolphin safe or has been harvested in compliance with the International Dolphin Conservation Program by a country that is a member of the Inter-American Tropical Tuna Commission or has initiated and within 6 months thereafter completed all steps required of applicant nations in accordance with Article V, paragraph 3 of the Convention establishing the Inter-American Tropical Tuna Commission, to become a member of that organization;

''(2) except as provided for in subsection 101(d), for any person or vessel subject to the jurisdiction of the United States intentionally to set a purse seine net on or to encircle any marine mammal in the course of tuna fishing operations in the eastern tropical Pacific Ocean except in accordance with this title and regulations issued pursuant to this title; and

''(3) for any person to import any yellowfin tuna or yellowfin tuna product or any other fish or fish

product in violation of a ban on importation imposed under section 101(a)(2);'';

(2) by inserting ''(a)(5) or'' before ''(a)(6)'' in subsection (b)(2); and

(3) by striking subsection (d).

(e) Section 308 (16 U.S.C. 1418) is repealed.

(f) CLERICAL AMENDMENTS.—The table of contents in the first section of the Marine Mammal Protection Act of 1972 is amended by striking the items relating to title III and inserting in lieu thereof the following:

''TITLE III—INTERNATIONAL DOLPHIN CONSERVATION PROGRAM

''Sec. 301. Findings and policy.

''Sec. 302. International Dolphin Conservation Program.

''Sec. 303. Regulatory authority of the Secretary.

''Sec. 304. Research.

''Sec. 305. Reports by the Secretary.

''Sec. 306. Permits.

''Sec. 307. Prohibitions.''.

SEC. 7. AMENDMENTS TO THE TUNA CONVENTIONS ACT.

(a) Section 3(c) of the Tuna Conventions Act (16 U.S.C. 952(c)) is amended to read as follows:

''(c) at least one shall be either the Administrator, or an appropriate officer, of the National Marine Fisheries Service; and''.

(b) Section 4 of the Tuna Conventions Act (16 U.S.C. 953) is amended to read as follows:

"SEC. 4. GENERAL ADVISORY COMMITTEE AND SCIENTIFIC ADVISORY SUBCOMMITTEE.

"(a) APPOINTMENTS; PUBLIC PARTICIPATION; COMPENSATION. —
The Secretary, in consultation with the United States Commissioners, shall —

"(1) appoint a General Advisory Committee which shall be composed of not less than 5 nor more than 15 persons with balanced representation from the various groups participating in the fisheries included under the conventions, and from nongovernmental conservation organizations;

"(2) appoint a Scientific Advisory Subcommittee which shall be composed of not less than 5 nor more than 15 qualified scientists with balanced representation from the public and private sectors, including nongovernmental conservation organizations;

"(3) establish procedures to provide for appropriate public participation and public meetings and to provide for the confidentiality of confidential business data; and

"(4) fix the terms of office of the members of the General Advisory Committee and Scientific Advisory Subcommittee, who shall receive no compensation for their services as such members.

"(b) FUNCTIONS. —

"(1) GENERAL ADVISORY COMMITTEE.—The General Advisory Committee shall be invited to have representatives attend all nonexecutive meetings of the United States sections and shall be given full opportunity to examine and to be heard on all proposed programs of investigations, reports, recommendations, and regulations of the Commission. The General Advisory Committee may attend all meetings of the international commissions to which they are invited by such commissions.

"(2) SCIENTIFIC ADVISORY SUBCOMMITTEE.—

''(A) ADVICE.—The Scientific Advisory Subcommittee shall advise the General Advisory Committee and the Commissioners on matters including—

''(i) the conservation of ecosystems;

''(ii) the sustainable uses of living marine resources related to the tuna fishery in the eastern Pacific Ocean; and

''(iii) the long-term conservation and management of stocks of living marine resources in the eastern tropical Pacific Ocean.

''(B) OTHER FUNCTIONS AND ASSISTANCE.—The Scientific Advisory Subcommittee shall, as requested by the General Advisory Committee, the United States Commissioners, or the Secretary, perform functions and provide assistance required by formal agreements entered into by the United States for this fishery, including the International Dolphin Conservation Program. These functions may include—

''(i) the review of data from the Program, including data received from the Inter-American Tropical Tuna Commission;

''(ii) recommendations on research needs, including ecosystems, fishing practices, and gear technology research, including the development and use of selective, environmentally safe and cost-effective fishing gear, and on the coordination and facilitation of such research;

''(iii) recommendations concerning scientific reviews and assessments required under the Program and engaging, as appropriate, in such reviews and assessments;

''(iv) consulting with other experts as needed; and

''(v) recommending measures to assure the regular and timely full exchange of data among

the parties to the Program and each nation's National Scientific Advisory Committee (or its equivalent).

''(3) ATTENDANCE AT MEETINGS. — The Scientific Advisory Subcommittee shall be invited to have representatives attend all nonexecutive meetings of the United States sections and the General Advisory Subcommittee and shall be given full opportunity to examine and to be heard on all proposed programs of scientific investigation, scientific reports, and scientific recommendations of the commission. Representatives of the Scientific Advisory Subcommittee may attend meetings of the Inter-American Tropical Tuna Commission in accordance with the rules of such Commission.''.

(c) BYCATCH REDUCTION.—The Tuna Conventions Act (16 U.S.C. 951 et seq.) is amended by adding at the end thereof the following:

''SEC. 15. REDUCTION OF BYCATCH IN THE EASTERN TROPICAL PACIFIC OCEAN.

''The Secretary of State, in consultation with the Secretary of Commerce and acting through the United States Commissioners, shall seek, in cooperation with other nations whose vessel fish for tuna in the eastern tropical Pacific Ocean, to establish standards and measures for a bycatch reduction program for vessels fishing for yellowfin tuna in the eastern tropical Pacific Ocean. The bycatch reduction program shall include measures —

''(1) to require, to the maximum extent practicable, that sea turtles and other threatened species and endangered species are released alive;

''(2) to reduce, to the maximum extent practicable, the harvest of nontarget species;

"(3) to reduce, to the maximum extent practicable, the mortality of nontarget species; and

"(4) to reduce, to the maximum extent practicable, the mortality of juveniles of the target species.".

SEC. 8. EFFECTIVE DATES.

(a) AMENDMENTS TO TAKE EFFECT WHEN IDCP IN FORCE. — Sections 3 through 7 of this Act (except for section 304 of the Marine Mammal Protection Act of 1972 as added by section 6 of this Act) shall become effective upon—

(1) certification by the Secretary of Commerce that—

(A) sufficient funding is available to complete the first year of the study required under section 304(a) of the Marine Mammal Protection Act of 1972, as so added; and

(B) the study has commenced; and

(2) certification by the Secretary of State to Congress that a binding resolution of the Inter-American Tropical Tuna Commission or other legally binding instrument establishing the International Dolphin Conservation Program has been adopted and is in force.

(b) SPECIAL EFFECTIVE DATE. — Notwithstanding subsection (a), the Secretary of Commerce may issue regulations under —

(1) subsection (f)(2) of the Dolphin Protection Consumer Information Act (16 U.S.C. 1385(f)(2)), as added by section 5(b) of this Act;

(2) section 303(a) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1413(a)), as added by section 6(c) of this Act, at any time after the date of enactment of this Act.

Approved August 15, 1997.

APPENDIX F

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP)

DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
15 CFR Part 902 50 CFR Part 216
[Docket 990324081-9336-02, ID072098G]
RIN 0648-AI85

Federal Register: January 3, 2000 (Volume 65, Number 1)
Rules and Regulations
Page 30-59

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce. ACTION: Interim final rule; request for comments.

SUMMARY:

NMFS issues an interim final rule to implement provisions of the International Dolphin Conservation Program Act (IDCPA). This interim final rule allows the entry of yellowfin tuna into the United States under certain conditions from nations fully complying with the International Dolphin Conservation Program (IDCP). It also allows U.S. vessels to set their purse seines on dolphins in the ETP. The standard for the use of ``dolphin-safe" labels for tuna products also is changed. This interim final rule also establishes a tuna-tracking program to ensure adequate tracking and verification of tuna harvested in the ETP. DATES: Effective February 2, 2000. Comments must be

received no later than 5 p.m., Pacific standard time, on April 3, 2000.

. . .

Comments on Sundown Sets

Comment 81: Commenters felt NMFS' interpretation of section 303(a)(2)(B)(V) of the MMPA is contrary to the intent and meaning of the law. The law clearly states that backdown procedures must be completed 30 minutes before sundown, whereas the proposed rule would have required backdown to be completed 30 minutes after sundown. If NMFS believes that Congress erred, NMFS should seek an amendment to the statute, rather than promulgating regulations weaker than required by the law to fix a potential typographical error. NMFS also received comments in support of the proposed rule on sunset sets because the language of the rule is consistent with the Agreement on the IDCP.

Response: NMFS disagrees since the previous regulations, previous amendments to the MMPA, the La Jolla Agreement and the IDCP all specify that backdown procedures must be completed no later than one-half hour after sundown. Furthermore, under the Agreement on the IDCP, signatory nations agreed that the backdown procedure must be completed no later than one-half hour after sundown. Since no congressional reports or colloquy indicated that this ``revision'' was adopted purposefully, NMFS concludes the language in the IDCPA stating that backdown procedures must be completed no later than one-half hour before sundown must have been a drafting error. [**Page 39]

* * * * * * *

50 CFR Chapter II

PART 216--REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

3. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 et seq., unless otherwise noted.

4. In Sec. 216.3:

a. Remove the definitions--``ABI", ``Director, Southwest Region", ``ETP Fishing Area 1", ``ETP Fishing Area 2", ``ETP Fishing Area 3", ``Fishing season", ``Kill-per-set", ``Kill-per-ton", and ``Purse seine set on common dolphins";

b. Revise the definitions-- ``Fisheries Certificate of Origin", ``Import", and ``Tuna product"; and

c. Add the definitions-- ``Administrator, Southwest Region", ``Agreement on the International Dolphin Conservation Program (Agreement on the IDCP)", ``Declaration of Panama", "Force majeure", "International Dolphin Conservation Program (IDCP)", "International Dolphin Conservation Program Act (IDCPA)","International Review Panel (IRP)", ``Per-stock per-year dolphin mortality limit" and ``Serious injury" in alphabetical order to read as follows:

Sec. 216.3 Definitions.

* * * * *

Administrator, Southwest Region means the Regional Administrator, Southwest Region, National Marine Fisheries Service, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213, or his or her designee.

Agreement on the International Dolphin Conservation Program (Agreement on the IDCP) means the Agreement establishing the formal binding IDCP that was signed in Washington, DC on May 21, 1998.

* * * * *

Declaration of Panama means the declaration signed in Panama City, Republic of Panama, on October 4, 1995.

* * * * *

Fisheries Certificate of Origin means NOAA Form 370, as described in Sec. 216.24(f)(5).

* * * * *

Force majeure means forces outside the vessel operator's or vessel owner's control that could not be avoided by the exercise of due care.

* * * * *

Import means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the Customs laws of the United States; except that, for the purpose of any ban issued under 16 U.S.C. 1371(a)(2) on the importation of fish or fish products, the definition of ``import" in Sec. 216.24(f)(1)(ii) shall apply.

* * * * *

International Dolphin Conservation Program (IDCP) means the international program established by the agreement signed in La Jolla, California, in June 1992, as

formalized, modified, and enhanced in accordance with the Declaration of Panama and the Agreement on the IDCP.

International Dolphin Conservation Program Act (IDCPA) means Public Law 105-42, enacted into law on August 15, 1997.

International Review Panel (IRP) means the International Review Panel established by the Agreement on the IDCP.

* * * * *

Per-stock per-year dolphin mortality limit means the maximum allowable number of incidental dolphin mortalities and serious injuries from a specified stock per calendar year, as established under the IDCP.

* * * * *

Serious injury means any injury that will likely result in mortality.

* * * * *

Tuna product means any food product processed for retail sale and intended for human or animal consumption that contains an item listed in Sec. 216.24(f)(2)(i) or (ii), but does not include perishable items with a shelf life of less than 3 days.

* * * * *

5. Revise Sec. 216.24 to read as follows:

Sec. 216.24 Taking and related acts incidental to commercial fishing operations by tuna purse seine vessels in the eastern tropical Pacific Ocean.

(a)(1) No marine mammal may be taken in the course of a commercial fishing operation by a United States purse seine fishing vessel in the ETP unless the taking constitutes an incidental catch as defined in Sec. 216.3, and vessel and operator permits have been obtained in accordance with these regulations, and such taking is not in violation of such permits or regulations.

(2)(i) It is unlawful for any person using a United States purse seine fishing vessel of 400 short tons (st) (362.8 metric

tons (mt)) carrying capacity or less to intentionally deploy a net on or to encircle dolphins, or to carry more than two speedboats, if any part of its fishing trip is in the ETP.

(ii) It is unlawful for any person using a United States purse seine fishing vessel of greater than 400 short tons (362.8 mt) carrying capacity that does not have a valid permit obtained under these regulations to catch, possess, or land tuna if any part of the vessel's fishing trip is in the ETP.

(iii) It is unlawful for any person subject to the jurisdiction of the United States to receive, purchase, or possess tuna caught, possessed, or landed in violation of paragraph (a)(2)(ii) of this section.

(iv) It is unlawful for a person subject to the jurisdiction of the United States to intentionally deploy a purse seine net on, or to encircle, dolphins from a vessel operating in the ETP when the DML assigned to that vessel has been reached, or when there is not a DML assigned to that vessel.

(3) Upon written request made in advance of entering the ETP, the limitations in paragraphs (a)(2)(i) and (a)(2)(ii) of this section may be waived by the Administrator, Southwest Region, for the purpose of allowing transit through the ETP. The waiver will provide, in writing, the terms and conditions under which the vessel must operate, including a requirement to report by radio to the Administrator,Southwest Region, the vessel's date of exit from or subsequent entry into the permit area.

(b) Permits--(1) Vessel permit. The owner or managing owner of a United States purse seine fishing vessel of greater than 400 st (362.8 mt) carrying capacity that participates in commercial fishing operations in the ETP must possess a valid vessel permit issued under this paragraph (b) of this section. This permit is not transferable and must be renewed annually. If a vessel permit holder surrenders his/her permit to the [[Page 49]] Administrator, Southwest Region, the permit will not be returned and a new permit will not be

issued before the end of the calendar year. Vessel permits are valid through December 31 of each year.

(2) Operator permit. The person in charge of and actually controlling fishing operations (hereinafter referred to as the operator) on a United States purse seine fishing vessel engaged in commercial fishing operations under a vessel permit must possess a valid operator permit issued under paragraph (b) of this section. Such permits are not transferable and must be renewed annually. To receive a permit, the operator must have satisfactorily completed all required
training under paragraph (c)(4) of this section. The operator's permit is valid only when the permit holder is on a vessel with a valid vessel permit. Operator permits will be valid through December 31 of each year.

(3) Possession and display. A valid vessel permit issued pursuant to paragraph (b)(1) of this section must be on board the vessel while engaged in fishing operations, and a valid operator permit issued pursuant to paragraph (b)(2) of this section must be in the possession of the operator to whom it was issued. Permits must be shown upon request to NMFS enforcement agents, or to U.S. Coast Guard officers, or to designated agents of NMFS or the IATTC (including observers). A vessel owner or operator who is at sea on a fishing trip when his or her permit expires and to whom a permit for the next year has been issued may take marine mammals under the terms of the new permit without having to display it on board the vessel until the vessel returns to port.

(4) Application for vessel permit. The owner or managing owner of a purse seine vessel may apply for a vessel permit from the Administrator, Southwest Region, allowing at least 45 days for processing. The application must be signed by the applicant and contain:

(i) The name, official number, tonnage, carrying capacity in short or metric tons, maximum speed in knots, processing

equipment, and type and quantity of gear, including an inventory of equipment required under paragraph (c)(2) of this section if the application is for purse seining involving the intentional taking of marine mammals, of the vessel that is to be covered under the permit;

(ii) A statement of whether the vessel will make sets involving the intentional taking of marine mammals;

(iii) The type and identification number(s) of Federal, State, and local commercial fishing licenses under which vessel operations are conducted, and the dates of expiration;

(iv) The name(s) of the operator(s) anticipated to be used; and

(v) The name of the applicant, whether he/she is the owner or the managing owner, his/her address, telephone and fax numbers, and, if applicable, the name, address, telephone and fax numbers of the agent or organization acting on behalf of the vessel.

(5) Application for operator permit. A person wishing to operate a purse seine vessel may apply for an operator permit from the Administrator, Southwest Region, allowing at least 45 days for processing. The application must be signed by the applicant or the applicant's representative, if applicable, and contain:

(i) The name, address, telephone and fax numbers of the applicant;

(ii) The type and identification number(s) of any Federal, state, and local fishing licenses held by the applicant;

(iii) The name of the vessel(s) on which the applicant anticipates serving as an operator; and

(iv) The date, location, and provider of any training for the operator permit.

(6) Fees. (i) Vessel permit application fees. An application for a permit under paragraph (b)(1) of this section must include a fee for each vessel as specified on the application form. The Assistant Administrator may change the amount of this fee at any time if a different fee is determined in

accordance with the NOAA Finance Handbook and specified by the Administrator, Southwest Region, on the application form.

(ii) Operator permit fee. There is no fee for a operator permit under paragraph (b)(2) of this section. The Assistant Administrator may impose a fee or change the amount of this fee at any time if a different fee is determined in accordance with the NOAA Finance Handbook and specified by the Administrator, Southwest Region, on the application form.

(iii) Observer placement fee. The vessel permit holder must submit the fee for the placement of observers, as established by the IATTC or other approved observer program, to the Administrator, Southwest Region, by September 1 of the year prior to the year in which the vessel will be operated in the ETP. The Administrator, Southwest Region, will forward all observer placement fees to the IATTC or to the applicable international organization approved by the Administrator, Southwest Region.

(7) Application approval. The Administrator, Southwest Region, will determine the adequacy and completeness of an application and, upon determining that an application is adequate and complete, will approve that application and issue the appropriate permit, except for applicants having unpaid or overdue civil penalties, criminal fines, or other liabilities incurred in a legal proceeding.

(8) Conditions applicable to all permits-- (i) General Conditions. Failure to comply with the provisions of a permit or with these regulations may lead to suspension, revocation, modification, or denial of a permit. The permit holder, vessel, vessel owner, operator, or master may be subject, jointly or severally, to the penalties provided for under the MMPA. Procedures governing permit sanctions and denials are found at subpart D of 15 CFR part 904.

(ii) Observer placement. By obtaining a permit, the permit holder consents to the placement of an observer on the vessel during every trip involving operations in the ETP and agrees

to payment of the fees for observer placement. No observer will be assigned to a vessel unless that vessel owner has submitted payment of observer fees to the Administrator, Southwest Region. The observers may be placed under an observer program of NMFS, IATTC, or another international observer program approved by the IDCP and the Administrator, Southwest Region.

(iii) Explosives. The use of explosive devices is prohibited during all tuna purse seine operations that involve marine mammals.

(iv) Reporting requirements. (A) The vessel permit holder of each permitted vessel must notify the Administrator, Southwest Region or the IATTC contact designated by the Administrator, Southwest Region, at least 5 days in advance of the vessel's departure on a fishing voyage to allow for observer placement on every voyage.

(B) The vessel permit holder must notify the Administrator, Southwest Region, or the IATTC contact designated by the Administrator, Southwest Region, of any change of vessel operator at least 48 hours prior to departing on a trip. In the case of a change in operator due to an emergency, notification must be made within 72 hours of the change.

(v) Data release. By using a permit, the permit holder authorizes the release to NMFS and the IATTC of all data collected by observers aboard purse seine vessels during fishing trips under the IATTC observer program or another international observer program approved by the Administrator, Southwest Region. The permit holder must furnish the international observer [[Page 50]] program with all release forms required to authorize the observer data to be provided to NMFS and the IATTC. Data obtained under such releases will be used for the same purposes as would data collected directly by observers placed by NMFS and will be subject to the same standards of confidentiality.

(9) Mortality and serious injury reports. The Administrator, Southwest Region, will provide to the public periodic status reports summarizing the estimated incidental dolphin mortality and serious injury by U.S. vessels of individual species and stocks.

(c) Purse seining by vessels with DMLs. In addition to the terms and conditions set forth in paragraph (b) of this section, any permit for a vessel to which a DML has been assigned under paragraph (c)(8) of this section and any operator permit when used on such a vessel are subject to the following terms and conditions:

(1) A vessel may be used to chase and encircle schools of dolphins in the ETP only under the immediate direction of the holder of a valid operator's permit.

(2) No retention of Marine Mammals. Except as otherwise authorized by a specific permit, marine mammals incidentally taken must be immediately returned to the ocean without further injury. The operator of a purse seine vessel must take every precaution to refrain from causing or permitting incidental mortality or serious injury of marine mammals. Live marine mammals must not be brailed, sacked up, or hoisted onto the deck during ortza retrieval.

(3) Gear and equipment required for valid permit. A vessel possessing a vessel permit for purse seining involving the intentional taking of marine mammals may not engage in fishing operations involving the intentional deployment of the net on or encirclement of dolphins unless it is equipped with a dolphin safety panel in its purse seine, has the other required gear and equipment, and uses the required procedures.

(i) Dolphin safety panel. The dolphin safety panel must be a minimum of 180 fathoms in length (as measured before installation), except that the minimum length of the panel in nets deeper than 18 strips must be determined in a ratio of 10 fathoms in length for each strip of net depth. It must be installed so as to protect the perimeter of the backdown area.

The perimeter of the backdown area is the length of corkline that begins at the outboard end of the last bowbunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point. The dolphin safety panel must consist of small mesh webbing not to exceed 1 1/4 inches (3.18 centimeter (cm)) stretch mesh extending downward from the corkline and, if present, the base of the dolphin apron to a minimum depth equivalent to two strips of 100 meshes of 4 1/4 inches (10.80 cm) stretch mesh webbing. In addition, at least a 20-fathom length of corkline must be free from bunchlines at the apex of the backdown channel.

(ii) Dolphin safety panel markers. Each end of the dolphin safety panel and dolphin apron must be identified with an easily distinguishable marker.

(iii) Dolphin safety panel hand holds. Throughout the length of the corkline under which the dolphin safety panel and dolphin apron are located, hand hold openings must be secured so that they will not allow the insertion of a 1 3/8 inch (3.50 cm) diameter cylindrical-shaped object.

(iv) Dolphin safety panel corkline hangings. Throughout the length of the corkline under which the dolphin safety panel and dolphin apron are located, corkline hangings must be inspected by the vessel operator following each trip. Hangings found to have loosened to the extent that a cylindrical object with a 1 3/8 inch (3.50 cm) diameter can be inserted between the cork and corkline hangings, must be tightened so as not to allow the insertion of a cylindrical object with a 1 3/8 inch (3.50 cm) diameter.

(v) Speedboats. A minimum of three speedboats in operating condition must be carried. All speedboats carried aboard purse seine vessels and in operating condition must be rigged with tow lines and towing bridles or towing posts. Speedboat hoisting bridles may not be substituted for towing bridles.

(vi) Raft. A raft suitable to be used as a dolphin observation-and-rescue platform must be carried.

(vii) Face mask and snorkel, or view box. At least two face masks and snorkels or view boxes must be carried.

(viii) Lights. The vessel must be equipped with lights capable of producing a minimum of 140,000 lumens of output for use in darkness to ensure sufficient light to observe that procedures for dolphin release are carried out and to monitor incidental dolphin mortality.

(4) Vessel inspection--(i) Annual. At least once during each calendar year, purse seine nets and other gear and equipment required under Sec. 216.24(c)(2) must be made available for inspection and for a trial set/net alignment by an authorized NMFS inspector or IATTC staff as specified by the Administrator, Southwest Region, in order to obtain a vessel permit.

(ii) Reinspection. Purse seine nets and other gear and equipment required by these regulations must be made available for reinspection by an authorized NMFS inspector or IATTC staff as specified by the Administrator, Southwest Region. The vessel permit holder must notify the Administrator, Southwest Region, of any net modification at least 5 days prior to departure of the vessel in order to determine whether a reinspection or trial set/net alignment is required.

(iii) Upon failure to pass an inspection or reinspection, a vessel may not engage in purse seining involving the intentional taking of marine mammals until the deficiencies in gear or equipment are corrected as required by NMFS.

(5) Operator permit holder training requirements. An operator must maintain proficiency sufficient to perform the procedures required herein, and must attend and satisfactorily complete a formal training session approved by the Administrator, Southwest Region, in order to obtain his or her permit. At the training session an attendee will be

instructed on the relevant provisions and regulatory requirements of the MMPA and the IDCP, and the fishing gear and techniques that are required for, or will contribute to, reducing serious injury and mortality of dolphin incidental to purse seining for tuna. Operators who have received a written certificate of satisfactory completion of training and who possess a current or previous calendar year permit will not be required to attend additional formal training sessions unless there are substantial changes in the relevant provisions or implementing regulations of the MMPA or the IDCP, or in fishing gear and techniques. Additional training may be required for any operator who is found by the Administrator, Southwest Region, to lack proficiency in the required fishing procedures or familiarity with the relevant provisions or regulations of the MMPA or the IDCP.

(6) Marine mammal release requirements. All operators must use the following procedures during all sets involving the incidental taking of marine mammals in association with the capture and landing of tuna.

(i) Backdown procedure. Backdown must be performed following a purse seine set in which dolphins are captured in the course of catching tuna, and must be continued until it is no longer possible to remove live dolphins from the net by this procedure. At least one crewman must be deployed during backdown to aid in the release of dolphins. Thereafter, other release [[Page 51]] procedures required will be continued so that all live dolphins are released prior to the initiation of the sack-up procedure.

(ii) Prohibited use of sharp or pointed instrument. The use of a sharp or pointed instrument to remove any marine mammal from the net is prohibited.

(iii) Sundown sets prohibited. On every set encircling dolphin, the backdown procedure must be completed no later than one-half hour after sundown, except as provided here. For the purpose of this section, sundown is defined as the

time at which the upper edge of the sun disappears below the horizon or, if the view of the sun is obscured, the local time of sunset calculated from tables developed by the U.S. Naval Observatory or other authoritative source approved by the Administrator, Southwest Region. A sundown set is a set in which the backdown procedure has not been completed and rolling the net to sack-up has not begun within one-half hour after sundown. Should a set extend beyond one-half hour after sundown, the operator must use the required marine mammal release procedures including the use of the high intensity lighting system. In the event a sundown set occurs where the seine skiff was let go 90 or more minutes before sundown, and an earnest effort to rescue dolphins is made, the International Review Panel of the IDCP may recommend to the United States that in the view of the International Review Panel, prosecution by the United States is not recommended. Any such recommendation will be considered by the United States in evaluating the appropriateness of prosecution in a particular circumstance.

(iv) Dolphin safety panel. During backdown, the dolphin safety panel must be positioned so that it protects the perimeter of the backdown area. The perimeter of the backdown area is the length of corkline that begins at the outboard end of the last bow bunch pulled and continues to at least two-thirds the distance from the backdown channel apex to the stern tiedown point.

(7) Experimental fishing operations. The Administrator, Southwest Region, may authorize experimental fishing operations, consistent with the provisions of the IDCP, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce or eliminate dolphin mortality or serious injury, or do not require the encirclement of dolphins in the course of fishing operations. The Administrator, Southwest Region, may waive, as appropriate, any requirements of this section except DMLs and the obligation to carry an observer.

(i) A vessel permit holder may apply to the Administrator, Southwest Region, for an experimental fishing operation waiver allowing for processing no less than 90 days before the date the proposed operation is intended to begin. An application must be signed by the permitted operator and contain:

(A) The name(s) of the vessel(s) and the vessel permit holder(s) to participate;

(B) A statement of the specific vessel gear and equipment or procedural requirement to be exempted and why such an exemption is necessary to conduct the experiment;

(C) A description of how the proposed modification to the gear and equipment or procedures is expected to reduce incidental mortality or serious injury of marine mammals;

(D) A description of the applicability of this modification to other purse seine vessels;

(E) The planned design, time, duration, and general area of the experimental operation;

(F) The name(s) of the permitted operator(s) of the vessel(s) during the experiment; and

(G) A statement of the qualifications of the individual or company doing the analysis of the research.

(ii) The Administrator, Southwest Region, will acknowledge receipt of the application and, upon determining that it is complete, will publish a notice in the Federal Register summarizing the application, making the full application available for inspection and inviting comments for a minimum period of 30 days from the date of publication.

(iii) The Administrator, Southwest Region, after considering the information in the application and the comments received on it, will either issue a waiver to conduct the experiment which includes restrictions or conditions deemed appropriate, or deny the application, giving the reasons for denial.

(iv) A waiver for an experimental fishing operation will be valid only for the vessels and operators named in the permit, for the time period and areas specified, for trips carrying an observer designated by the Administrator, Southwest Region, when all the terms and conditions of the permit are met.

(v) The Administrator, Southwest Region, may suspend or revoke an experimental fishing waiver in accordance with 15 CFR part 904 if the terms and conditions of the waiver or the provisions of the regulations are not followed.

(8) Operator permit holder performance requirements. [Reserved]

(9) Vessel permit holder dolphin mortality limits. For purposes of this paragraph, the term ``vessel permit holder'' includes both the holder of a current vessel permit and also the holder of a vessel permit for the following year.

(i) By September 1 each year, a vessel permit holder desiring a DML for the following year must provide to the Administrator, Southwest Region, the name of the United States purse seine fishing vessel(s) of carrying capacity greater than 400 st (362.8 mt) carrying capacity that the owner intends to use to intentionally deploy purse seine fishing nets in the ETP to encircle dolphins in an effort to capture tuna during the following year. NMFS will forward the list of purse seine vessels to the Director of the IATTC on or before October 1, or as otherwise required by the IDCP, for assignment of a DML for the following year under the provisions of Annex IV of the Agreement on the IDCP.

(ii) Each vessel permit holder that desires a DML only for the period between July 1 to December 31 must provide the Administrator, Southwest Region, by September 1 of the prior year, the name of the United States purse seine fishing vessel(s) of greater than 400 st (362.8 mt) carrying capacity that the owner intends to use to intentionally deploy purse seine fishing nets in the ETP to encircle dolphins in an effort

to capture tuna during the period. NMFS will forward the list of purse seine vessels to the Director of the IATTC on or before October 1, or as otherwise required under the IDCP, for possible assignment of a DML for the 6-month period July 1 to December 31. Under the IDCP, the DML will be calculated by the IDCP from any unutilized pool of DMLs in accordance with the procedure described in Annex IV of the Agreement on the IDCP and will not exceed one-third of an unadjusted full-year DML as calculated by the IDCP.

(iii)(A) The Administrator, Southwest Region, will notify vessel owners of the DML assigned for each vessel for the following year, or the second half of the year, as applicable.

(B) The Administrator, Southwest Region, may adjust the DMLs in accordance with Annex IV of the Agreement on the IDCP. All adjustments of full-year DMLs will be made before January 1, and the Aministrator, Southwest Region, will notify the Director of the IATTC of any adjustments prior to a vessel departing on a trip using its adjusted DML. The

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notification will be no later than February 1 in the case of adjustments to full-year DMLs, and no later than May 1 in the case of adjustments to DMLs for the second half of the year.

(C) Within the requirements of Annex IV of the Agreement on the IDCP, the Administrator, Southwest Region, may adjust a vessel's DML if it will further scientific or technological advancement in the protection of marine mammals in the fishery or if the past performance of the vessel indicates that the protection or use of the yellowfin tuna stocks or marine mammals is best served by the adjustment, within the mandates of the MMPA.

Experimental fishing operation waivers or scientific research permits will be considered a basis for adjustments.

(iv)(A) A vessel assigned a full-year DML that does not make a set on dolphins by April 1 or that leaves the fishery will lose its DML for the remainder of the year, unless the failure to set on dolphins is due to force majeure or other extraordinary circumstances as determined by the International Review Panel.

(B) A vessel assigned a DML for the second half of the year will be considered to have lost its DML if the vessel has not made a set on dolphins before December 31, unless the failure to set on dolphins is due to force majeure or extraordinary circumstances as determined by the International Review Panel.

(C) Any vessel that loses its DML for 2 consecutive years will not be eligible to receive a DML for the following year.

(D) NMFS will determine, based on available information, whether a vessel has left the fishery.

(1) A vessel lost at sea, undergoing extensive repairs, operating in an ocean area other than the ETP, or for which other information indicates will no longer be conducting purse seine operations in the ETP for the remainder of the period covered by the DML will be determined to have left the fishery.

(2) NMFS will make all reasonable efforts to determine the intentions of the vessel owner, and the owner of any vessel that has been preliminarily determined to have left the fishery will be provided notice of such preliminary determination and given the opportunity to provide information on whether the vessel has left the fishery prior to NMFS making a final determination under 15 CFR part 904 and notifying the IATTC.

(v) Any vessel that exceeds its assigned DML after any applicable adjustment under paragraph (c)(8)(iii) of this section will have its DML for the subsequent year reduced

by 150 percent of the overage, unless another adjustment is determined by the International Review Panel.

(vi) A vessel that is covered by a valid vessel permit and that does not normally fish for tuna in the ETP but desires to participate in the fishery on a limited basis may apply for a per-trip DML from the Administrator, Southwest Region, at any time, allowing at least 60 days for processing. The request must state the expected number of trips involving sets on dolphins and the anticipated dates of the trip or trips. The request will be forwarded to the Director of the IATTC for processing in accordance with Annex IV of the Agreement on the IDCP. A per-trip DML will be assigned if one is made available in accordance with the terms of Annex IV of the IDCP. If a vessel assigned a per-trip DML does not set on dolphins during that trip, the vessel will be considered to have lost its DML unless this was a result of force majeure or other extraordinary circumstances as determined by the International Review Panel. After two consecutive losses of a DML, a vessel will not be eligible to receive a DML for the next fishing year.

(vii) Observers will make their records available to the vessel operator at any reasonable time, including after each set, in order for the operator to monitor the balance of the DML(s) remaining for use.

(viii) Vessel and operator permit holders must not deploy a purse seine net on or encircle any school of dolphins containing individuals of a particular stock of dolphins:

(A) when the applicable per-stock per-year dolphin mortality limit for that stock of dolphins (or for that vessel, if so assigned) has been reached or exceeded; or

(B) after the time and date provided in actual notification or notification in the Federal Register by the Administrator, Southwest Region, based upon the best available evidence, stating when any applicable per-stock per-year dolphin mortality limit has been reached or exceeded, or is expected to be reached in the near future.

(ix) If individual dolphins belonging to a stock that is prohibited from being taken are not reasonably observable at the time the net skiff attached to the net is released from the vessel at the start of a set, the fact that individuals of that stock are subsequently taken will not be cause for enforcement action provided that all procedures required by the applicable regulations have been followed.

(x) Vessel and operator permit holders must not intentionally deploy a purse seine net on or encircle dolphins intentionally:

(A) when the vessel's DML, as adjusted, is reached or exceeded; or

(B) after the date and time provided in actual notification by letter, facsimile, radio, or electronic mail, or notice in the Federal Register by the Administrator, Southwest Region, based upon the best available evidence, that intentional sets on dolphins must cease because the total of the DMLs assigned to the U.S. fleet has been reached or exceeded, or is expected to be exceeded in the near future.

(xi) Sanctions recommended by the International Review Panel for any violation of these rules will be considered by NMFS and NOAA in enforcement actions brought under these regulations.

(xii) Intentionally deploying a purse seine net on, or to encircle, dolphins after a vessel's DML, as adjusted, has been reached will disqualify the vessel from consideration for a DML for the following year. If already assigned, the DML for the following year will be withdrawn, and the Director of the IATTC will be notified by NMFS that the DML assigned to that vessel will be unutilized. Procedures found at 15 CFR part 904 apply to the withdrawal of the permit.

(d) Purse seining by vessels without assigned DMLs. In addition to the requirements of paragraph (b) of this section, a vessel permit used for a trip not involving an assigned DML and the operator's permit when used on such a vessel

are subject to the following terms and conditions: a permit holder may take marine mammals provided that such taking is an accidental occurrence in the course of normal commercial fishing operations and the vessel does not intentionally deploy its net on, or to encircle, dolphins; marine mammals taken incidental to such commercial fishing operations must be immediately returned to the environment where captured without further injury, using release procedures such as hand rescue, and aborting the set at the earliest effective opportunity; the use of one or more rafts and face masks or view boxes to aid in the rescue of dolphins is recommended.

(e) Observers: (1) The holder of a vessel permit must allow an observer duly authorized by the Administrator, Southwest Region, to accompany the vessel on all fishing trips in the ETP for the purpose of conducting research and observing operations, including collecting information that may be used in civil or criminal penalty proceedings, forfeiture actions, or permit sanctions. A vessel that fails to carry an observer in

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accordance with these requirements may not engage in fishing operations.

(2) Research and observation duties will be carried out in such a manner as to minimize interference with commercial fishing operations. Observers must be provided access to vessel personnel and to dolphin safety gear and equipment, electronic navigation equipment, radar displays, high powered binoculars, and electronic communication equipment. The navigator must provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. Observers must be provided with adequate space on the bridge or pilothouse for clerical

work, as well as space on deck adequate for carrying out observer duties. No vessel owner, master, operator, or crew member of a permitted vessel may impair, or in any way interfere with, the research or observations being carried out. Masters must allow observers to use vessel communication equipment to report information concerning the take of marine mammals and other observer collected data upon request of the observer.

(3) Any marine mammals killed during fishing operations that are accessible to crewmen and requested from the permit holder or master by the observer must be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals or marine mammal parts designated as biological specimens by the observer must be retained in cold storage aboard the vessel until retrieved by authorized personnel of NMFS or the IATTC when the vessel returns to port for unloading.

(4) It is unlawful for any person to forcibly assault, impede, intimidate, interfere with, or to influence or attempt to influence an observer, or to harass (including sexual harassment) an observer by conduct which has the purpose or effect of unreasonably interfering with the observer's work performance, or which creates an intimidating, hostile, or offensive environment. In determining whether conduct constitutes harassment, the totality of the circumstances, including the nature of the conduct and the context in which it occurred, will be considered. The determination of the legality of a particular action will be made from the facts on a case-by-case basis.

(5)(i) All observers must be provided sleeping, toilet and eating accommodations at least equal to that provided to a full crew member. A mattress or futon on the floor or a cot is not acceptable in place of a regular bunk. Meal and other galley privileges must be the same for the observer as for other crew members.

(ii) Female observers on a vessel with an all-male crew must be accommodated either in a single-person cabin or, if reasonable privacy can be ensured by installing a curtain or other temporary divider, in a two-person cabin shared with a licensed officer of the vessel. If the cabin assigned to a female observer does not have its own toilet and shower facilities that can be provided for the exclusive use of the observer, then a schedule for time-sharing common facilities must be established before the placement meeting and approved by NMFS or other approved observer program and must be followed during the entire trip.

(iii) In the event there are one or more female crew members, the female observer must be provided a bunk in a cabin shared solely with female crew members, and provided toilet and shower facilities shared solely with these female crew members.

(f) Importation, purchase, shipment, sale and transport. (1)(i) It is illegal to import into the United States any fish, whether fresh, frozen, or otherwise prepared, if the fish have been caught with commercial fishing technology that results in the incidental kill or incidental serious injury of marine mammals in excess of that allowed under this part for U.S. fishermen, or as specified at paragraphs (f)(7) through (f)(9) of this section.

(ii) For purposes of this paragraph(f), and in applying the definition of an ``intermediary nation,'' an import occurs when the fish or fish product is released from a nation's Customs' custody and enters into the territory of the nation. For other purposes, ``import'' is defined in Sec. 216.3.

(2)(i) HTS numbers requiring a Fisheries Certificate of Origin, subject to yellowfin tuna embargo. The following U.S. Harmonized Tariff Schedule (HTS) numbers identify yellowfin tuna or yellowfin tuna products that are harvested in the ETP purse seine fishery and imported into the United States. All shipments containing tuna or tuna products

imported into the United States under these HTS numbers must be accompanied by a Fisheries Certificate of Origin (FCO), NOAA Form 370.

Yellowfin tuna identified by any of the following HTS numbers that was harvested using a purse seine in the ETP may not be imported into the United States unless both the nation with jurisdiction over the harvesting vessel and the exporting nation (if different) have an affirmative finding under paragraph (f)(9) of this section.

(A) Frozen:	
0303.42.0020	Yellowfin tuna, whole, frozen.
0303.42.0040	Yellowfin tuna, eviscerated, head on, frozen.
0303.42.0060	Yellowfin tuna, other, frozen.
(B) Canned:	
1604.14.1000	Tuna, non-specific, in airtight containers, in oil.
1604.14.2040	Tuna, other than albacore, not over 7kg, in airtight containers.
1604.14.3040	Tuna, other than albacore, in airtight containers, not in oil, over quota.
(C) Loins:	
1604.14.4000	Tuna, not in airtight containers, not in oil, over 6.8kg.

1604.14.5000	Tuna, other, not in airtight containers.

(D) Other (only if the product contains tuna):

0304.10.4099	Other fish, fillets and other fish meat, fresh or chilled.
0304.20.2066	Other fish, fillets, skinned, in blocks weighing over 4.5kg, frozen.
0304.20.6096	Other fish, fillets, frozen.
0304.90.1089	Other fish meat, in bulk or immediate containers, fresh or chilled.
0304.90.9091	Other fish meat, fresh or chilled.

(ii) HTS numbers requiring a Fisheries Certificate of Origin, not subject to yellowfin tuna embargo. The following HTS numbers identify tuna or tuna products, other than fresh tuna or tuna identified in paragraph (f)(2)(i) of this section, known to be imported into the United States. All shipments imported into the United States under these HTS numbers must be accompanied by a FCO. The shipment may not be imported into the United States if harvested by a large-scale driftnet nation, unless accompanied by the official statement described in paragraph (f)(5)(x) of this section.

(A) Frozen:

0303.41.0000	Albacore or longfinned tunas, frozen.
0303.43.0000	Skipjack, frozen.
0303.49.0020	Bluefin, frozen.

0303.49.0040	Other tuna, frozen.
(B) Canned:	
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1604.14.2020	Albacore tuna, in airtight containers, not in oil, not over 7kg, in quota.
1604.14.3020	Albacore tuna, in airtight containers, not in oil, not in quota.

(iii) Exports from driftnet nations only: HTS numbers requiring a Fisheries Certificate of Origin and official certification. The following HTS numbers identify categories of fish and shellfish, other than those identified in paragraphs (f)(2)(i) and (f)(2)(ii) of this section, known to have been harvested using a large-scale driftnet and imported into the United States. Shipments exported from a large-scale driftnet nation and imported into the United States under any of the HTS numbers listed in paragraph (f)(2) of this section must be accompanied by an FCO and the official statement described in paragraph (f)(5)(x) of this section.

(A) Frozen:	
0303.10.0012	Salmon, chinook, frozen.
0303.10.0022	Salmon, chum, frozen.
0303.10.0032	Salmon, pink, frozen.
0303.10.0042	Salmon, sockeye, frozen.
0303.10.0052	Salmon, coho, frozen.
0303.10.0062	Salmon, Pacific, non-specific, frozen.
0303.21.0000	Trout, frozen.

0303.22.0000	Salmon, Atlantic and Danube, frozen.
0303.29.0000	Salmonidae, other, frozen.
0303.70.4097	Fish, other, frozen.
0303.75.0010	Dogfish, frozen.
0303.75.0090	Other sharks, frozen.
0303.79.2041	Swordfish steaks, frozen
0303.79.2049	Swordfish, other, frozen.
0304.20.2066	Fish, fillet, skinned, in blocks frozen over 4.5kg.
0304.20.6008	Salmonidae, salmon fillet, frozen.
0304.20.6096	Fish, fillet, frozen.
0307.49.0010	Squid, other, fillet, frozen.
(B) Canned:	
1604.11.2020	Salmon, pink, canned in oil, in airtight containers.
1604.11.2030	Salmon, sockeye, canned in oil, in airtight containers.
1604.11.2090	Salmon, other, canned in oil, in airtight containers.
1604.11.4010	Salmon, chum, canned, not in oil.
1604.11.4020	Salmon, pink, canned, not in oil.
1604.11.4030	Salmon, sockeye, canned, not in oil.
1604.11.4040	Salmon, other, canned, not in oil.
1604.11.4050	Salmon, other, canned, not in oil.
1604.19.2000	Fish, other, in airtight

	containers, not in oil.
1604.19.3000	Fish, other, in airtight containers, in oil.
1605.90.6055	Squid, loligo, prepared/ preserved.
(C) Other:	
0304.10.4099	Other fish, fillets and other fish meat, fresh or chilled.
0304.20.2066	Other fish, fillets, skinned, in blocks weighing over 4.5kg, frozen.
0304.20.6098	Other fish, fillets, frozen.
0304.90.1089	Other fish, fillets and fish meat, in bulk or in immediate containers, fresh or chilled.
0304.90.9092	Other fish meat, fresh or chilled.
0305.30.6080	Fish, non-specific, fillet. dried/salted/brine.
0305.49.4040	Fish, non-specific, smoked.
0305.59.2000	Shark fins.
0305.59.4000	Fish, non-specific, dried.
0305.69.4000	Salmon, non-specific, salted.
0305.69.5000	Fish, non-specific, in immediate containers, salted, not over 6.8kg.
0305.69.6000	Fish, non-specific, salted, other.
0307.49.0050	Squid, non-specific frozen/ dried/salted/brine.
0307.49.0060	Squid, non-specific, &

	cuttle fish frozen/dried/ salted/brine.

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(3) Imports requiring a Fisheries Certificate of Origin. Shipments containing the following may not be imported into the United States unless a completed FCO is **filed** with the Customs Service at the time of importation:

(i) Tuna classified under an HTS number listed in paragraphs (f)(2)(i) or (f)(2)(ii) of this section, or

(ii) Fish classified under an HTS number listed in paragraph (f)(2) of this section that was harvested by a vessel of a large-scale driftnet nation, as identified under paragraph (f)(8) of this section.

(4) Disposition of Fisheries Certificates of Origin. The FCO form described in paragraph (f)(5) of this section may be obtained from the Administrator, Southwest Region, or downloaded from the Internet at http://swr.ucsd.edu/noaa370.htm. The FCO required under paragraph (f)(3) of this section must accompany the tuna or tuna products from entry into the United States, through final processing, and it must be endorsed at each change in ownership. FCOs that require multiple endorsements must be submitted to the Administrator, Southwest Region, by the last endorser when all required endorsements are completed. An invoice must accompany the shipment at the time of importation or, in the alternative, must be made available within 30 days of a request by the Secretary or the Administrator, Southwest Region, to produce the invoice.

(5) Contents of Fisheries Certificate of Origin. An FCO, certified to be accurate by the first exporter of the accompanying shipment, must include the following information:

(i) Customs entry identification;

(ii) Date of entry;

(iii) Exporter's full name and complete address;

(iv) Importer's or consignee's full name and complete address;

(v) Species description, product form, and HTS number;

(vi) Total net weight of the shipment in kilograms;

(vii) Ocean area where the fish were harvested (ETP, Western Pacific Ocean, South Pacific Ocean, Atlantic Ocean, Caribbean Sea, Indian Ocean, or other);

(viii) Type of fishing gear used to harvest the fish (purse seine, longline, baitboat, large-scale driftnet, gillnet, trawl, pole and line, or other);

(ix) Country under whose laws the harvesting vessel operated based upon the flag of the vessel or, if a certified charter vessel, the country that accepted responsibility for the vessel's fishing operations;

(x) Dates on which the fishing trip began and ended;

(xi) If the shipment includes tuna or products harvested with a purse seine net, the name of the harvesting vessel;

(xii) Dolphin safe condition of the shipment;

(xiv) For shipments harvested by vessels of a nation known to use large-scale driftnets, as determined by the Secretary pursuant to paragraph (f)(8) of this section, a statement must be included on the Fisheries Certificate of Origin that is dated and signed by a responsible government official of the harvesting nation, certifying that the fish or fish products were harvested by a method other than large-scale driftnet; and

(xii) If the shipment contains tuna harvested in the ETP by a purse seine vessel of more than 400 st (362.8 mt) carrying capacity, each importer or processor who takes custody of the shipment must sign and date the form to certify that the form and attached

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documentation accurately describe the shipment of fish that they accompany.

(6) Dolphin-safe label. Tuna or tuna products sold in or exported from the United States that include on the label the term ``dolphin-safe" or any other term or symbol that claims or suggests the tuna were harvested in a manner not injurious to dolphins are subject to the requirements of subpart H of this part.

(7) Scope of embargoes--(i) ETP yellowfin tuna embargo. Yellowfin tuna or yellowfin tuna products harvested using a purse seine in the ETP identified by an HTS number listed in paragraph (f)(2)(i) of this section may not be imported into the United States if such tuna or tuna products were:

(A) Harvested on or after March 3, 1999, the effective date of section 4 of the IDCPA, and harvested by, or exported from, a nation that the Assistant Administrator has determined has purse seine vessels of greater than 400 st (362.8 mt) carrying capacity harvesting tuna in the ETP, unless the Assistant Administrator has made an affirmative finding required for importation for that nation under paragraph (f)(9) of this section;

(B) Exported from an intermediary nation, as defined in section 3 of the MMPA, and a ban is currently in force prohibiting the importation from that nation under paragraph (f)(9)(viii) of this section; or

(C) Harvested before March 3, 1999, the effective date of section 4 of the IDCPA, and would have been banned from importation under section 101(a)(2) of the MMPA at the time of harvest.

(ii) Driftnet embargo. A shipment containing an item listed in paragraph (f)(2) of this section may not be imported into the United States if it:

(A) Was exported from or harvested on the high seas by any nation determined by the Assistant Administrator to be engaged in large-scale driftnet fishing, unless the FCO is accompanied by an original statement by a responsible government official of the harvesting nation, signed and dated by that official, certifying that the fish or fish products

were harvested by a method other than large-scale driftnet; or

(B) Is identified on the FCO as having been harvested by a large-scale driftnet.

(8) Large-scale driftnet nation: determination. Based upon the best information available, the Assistant Administrator will determine which nations have registered vessels that engage in fishing using large-scale driftnets. Such determinations will be published in the Federal Register. A responsible government official of any such nation may certify to the Assistant Administrator that none of thenation's vessels use large-scale driftnets. Upon receipt of the certification, the Assistant Administrator may find, and publish such finding in the Federal Register, that none of that nation's vessels engage in fishing with large-scale driftnets.

(9) Affirmative finding procedure for nations harvesting yellowfin tuna using a purse seine in the ETP. (i) The Assistant Administrator will determine, on an annual basis, whether to make an affirmative finding based upon documentary evidence provided by the government of the exporting nation, by the government of the harvesting nation, if different, or by the IDCP and the IATTC, and will publish the finding in the Federal Register. A finding will remain valid for 1 year or for such other period as the Assistant Administrator may determine. An affirmative finding will be terminated if the Assistant Administrator determines that the requirements of this paragraph are no longer being met. Every 5 years, the government of the harvesting nation, must submit such documentary evidence directly to the Assistant Administrator and request an affirmative finding. Documentary evidence needs to be submitted by the harvesting nation for the first affirmative finding subsequent to the effective date of this rule. The Assistant Administrator may require the submission of supporting documentation or other verification of statements made in connection with requests to allow importations. An

affirmative finding applies to tuna and tuna products that were harvested by vessels of the nation after February 15, 1999. To make an affirmative finding, the Assistant Administrator must find that:

(A) The harvesting nation participates in the IDCP and is either a member of the IATTC or has initiated (and within 6 months thereafter completed) all steps required of applicant nations, in accordance with article V, paragraph 3, of the Convention establishing the IATTC, to become a member of that organization;

(B) The nation is meeting its obligations under the IDCP and its obligations of membership in the IATTC, including all financial obligations;

(C)(1) The annual total dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) did not exceed the aggregated total of the mortality limits assigned by the IDCP for that nation's purse seine vessels for the year preceding the year in which the finding would start; or

(2)(i) Because of extraordinary circumstances beyond the control of the nation and the vessel captains, the total dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) exceeded the aggregated total of the mortality limits assigned by the IDCP for that nation's purse seine vessels; and

(ii) Immediately after the national authorities discovered the aggregate mortality of its fleet had been exceeded, the nation required all its vessels to cease fishing for tuna in association with dolphins for the remainder of the calendar year; and

(D)(1) For calendar year 2000 and any subsequent years in which the parties agree to a global allocation system for per-stock per-year individual stock quotas, the nation responded to the notification from the IATTC that an individual stock

quota had been reached by prohibiting any additional sets on the stock for which the quota had been reached;

(2) If a per-stock per-year quota is allocated to each nation, the annual per-stock per-year dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) did not exceed the aggregated total of the per-stock per-year limits assigned by the IDCP for that nation's purse seine vessels (if any) for the year preceding the year in which the finding would start; or

(3)(i) Because of extraordinary circumstances beyond the control of the nation and the vessel captains, the per-stock per-year dolphin mortality of the nation's purse seine fleet (including certified charter vessels operating under its jurisdiction) exceeded the aggregated total of the per-stock per-year limits assigned by the IDCP for that nation's purse seine vessels; and

(ii) Immediately after the national authorities discovered the aggregate per-stock mortality limits of its fleet had been exceeded, the nation required all its vessels to cease fishing for tuna in association with the stocks whose limits had been exceeded, for the remainder of the calendar year.

(ii) Documentary Evidence and Compliance with the IDCP.--(A) Documentary Evidence. The Assistant Administrator will make an affirmative finding under paragraph (f)(9)(i) of this section only if the government of the harvesting nation provides directly to the Assistant Administrator, or authorizes the IATTC to release to the Assistant Administrator, complete, accurate, and timely information that enables the Assistant Administrator to determine whether the harvesting nation is meeting the obligations of the [[Page 56]] IDCP, and whether ETP-harvested tuna imported from such nation comports with the tracking and verification regulations of subpart H of this part.

(B) Revocation. After considering the information provided under paragraph (f)(9)(ii)(A) of this section, each

party's financial obligations to the IATTC, and any other relevant information, including information that a nation is consistently failing to take enforcement actions on violations which diminish the effectiveness of the IDCP, the Assistant Administrator, in consultation with the Secretary of State, will revoke an affirmative finding issued to a nation that is not meeting the obligations of the IDCP.

(iii) A harvesting nation may apply for an affirmative finding at any time by providing to the Assistant Administrator the information and authorizations required in paragraphs (f)(9)(i) and (f)(9)(ii) of this section, allowing at least 60 days from the submission of complete information to NMFS for processing.

(iv) The Assistant Administrator will make or renew an affirmative finding for the period from April 1 through March 31, or portion thereof, if the harvesting nation has provided all the information and authorizations required by paragraphs (f)(9)(i) and (f)(9)(ii) of this section, and has met the requirements of paragraphs (f)(9)(i) and (f)(9)(ii) of this section.

(v) Reconsideration of finding. The Assistant Administrator may reconsider a finding upon a request from, and the submission of additional information by, the harvesting nation, if the information indicates that the nation has met the requirements under paragraphs (f)(9)(i) and (f)(9)(ii) of this section.

(vi) Intermediary nation. Except as authorized under this paragraph, no tuna or tuna products classified under one of the HTS numbers listed in paragraph (f)(2)(i) of this section may be imported into the United States from any intermediary nation. An ``intermediary nation'' is a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation into the United States pursuant to section 101(a)(2)(B) of the MMPA, unless shown not to be yellowfin tuna or yellowfin

tuna products harvested using purse seine in the ETP. The Assistant Administrator will publish in the Federal Register a notice announcing when NMFS has determined, based on the best information available, that a nation is an ``intermediary nation.'' After the effective date of that notice, these import restrictions shall apply. Shipments of yellowfin tuna or yellowfin tuna products shipped through a nation on a through bill of lading or in another manner that does not enter the shipments into that nation as an importation do not make that nation an intermediary nation.

(A) Intermediary nation determination status. Imports from an intermediary nation of tuna and tuna products classified under any of the HTS numbers in paragraph (f)(2)(i) of this section may be imported into the United States only if the Assistant Administrator determines and publishes in the Federal Register that the intermediary nation has provided certification and reasonable proof that it has not imported in the preceding 6 months yellowfin tuna or yellowfin tuna products that are subject to a ban on direct importation into the United States under section 101(a)(2)(B) of the MMPA. At that time, the nation shall no longer be considered an ``intermediary nation'' and these import restrictions shall no longer apply.

(B) Changing the status of intermediary nation determinations. The Assistant Administrator will review decisions under this paragraph upon the request of an intermediary nation. Such requests must be accompanied by specific and detailed supporting information or documentation indicating that a review or reconsideration is warranted. For purposes of this paragraph, the term ``certification and reasonable proof'' means the submission to the Assistant Administrator by a responsible government official from the nation of a document reflecting the nation's customs records for the preceding 6 months, together with a certification attesting that the document is accurate.

(vii) Pelly certification. After 6 months of an embargo being in place against a nation under this section, that fact will be certified to the President for purposes of certification under section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)) for as long as the embargo remains in effect.

(viii) Coordination. The Assistant Administrator will promptly advise the Department of State and the Department of the Treasury of embargo decisions, actions and finding determinations.

(10) Fish refused entry. If fish is denied entry under paragraph (f)(3) of this section, the District Director of Customs shall refuse to release the fish for entry into the United States and shall issue a notice of such refusal to the importer or consignee.

(11) Disposition of fish refused entry into the United States; redelivered fish. Fish which is denied entry under paragraph (f)(3) of this section and which is not exported under Customs supervision within 90 days from the date of notice of refusal of admission or date of redelivery shall be disposed of under Customs laws and regulations. Provided however, that any disposition shall not result in an introduction into the United States of fish caught in violation of the MMPA.

(12) Market Prohibitions. It is unlawful for any person to sell, purchase, offer for sale, transport, or ship in the United States, any tuna or tuna products unless the tuna products are either:

(i) Dolphin-safe under subpart H; or

(ii) harvested in compliance with the IDCP by vessels under the jurisdiction of a nation that is a member of the IATTC or has initiated, and within 6 months thereafter completes, all steps required by applicant nations to become members of the IATTC.

(iii) For purposes of this section, tuna or tuna products are ``dolphin-safe'' if they are dolphin-safe under subpart H.

(g) Penalties. Any person or vessel subject to the jurisdiction of the United States will be subject to the penalties provided for under the MMPA for the conduct of fishing operations in violation of these regulations.

6. In Subpart D, a new Sec. 216.46 is added to read as follows:

Sec. 216.46 U.S. citizens on foreign flag vessels operating under the International Dolphin Conservation Program.

The MMPA's provisions do not apply to a citizen of the United States who incidentally takes any marine mammal during fishing operations in the ETP which are outside the U.S. exclusive economic zone (as defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)), while employed on a fishing vessel of a harvesting nation that is participating in, and in compliance with, the IDCP.

7. Sections 216.90 through 216.94 are revised to read as follows:

Sec. 216.90 Purposes.

This subpart governs the requirements for using the official mark, described in Sec. 216.96, or an alternative mark that refers to dolphins, porpoises, or marine mammals, to label tuna or tuna products offered for sale in or exported from the United States using the term ``dolphin-safe'' or suggesting the tuna were harvested in a manner not injurious to dolphins.

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Sec. 216.91 Dolphin-safe labeling standards.

(a) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any producer, importer, exporter, distributor, or seller of any tuna products that are exported from or offered for sale in the United States to include on the label of those products the term ``dolphin-safe'' or any other term or symbol that claims or suggests that the tuna contained in the products were harvested using a method of fishing that is not harmful to dolphins if the products contain tuna harvested:

(1) ETP large purse seine vessel. In the ETP by a purse seine vessel of greater than 400 st (362.8 mt) carrying capacity unless:

(i) The documentation requirements for dolphin-safe tuna under Secs. 216.92 and 216.94 are met;

(ii) No dolphin were killed or seriously injured during the sets in which the tuna were caught; or

(iii) If the Assistant Administrator publishes notification in the Federal Register announcing a finding that the intentional deployment of purse seine nets on or encirclement of dolphins is having a significant adverse impact on any depleted stock:

(A) No tuna products were caught on a trip using a purse seine net intentionally deployed on or to encircle dolphins; and

(B) No dolphins were killed or seriously injured during the sets in which the tuna were caught.

(2) Non-ETP purse seine vessel. Outside the ETP by a vessel using a purse seine net:

(i) In a fishery in which the Assistant Administrator has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the ETP), unless such products are accompanied by a written statement, executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, certifying that no purse seine net was

intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught; or

(ii) In any other fishery unless the products are accompanied by a written statement executed by the captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested;

(3) Driftnet. By a vessel engaged in large-scale driftnet fishing; or

(4) Other fisheries. By a vessel in a fishery other than one described in paragraphs (a)(1) through(a)(3) of this section that is identified by the Assistant Administrator as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement, executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Assistant Administrator determines that such an observer statement is necessary.

(b) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to willingly and knowingly use a label referred to in this section in a campaign or effort to mislead or deceive consumers about the level of protection afforded dolphins under the IDCP.

(c) A tuna product that is labeled with the official mark, described in Sec. 216.96, may not be labeled with any other label or mark that refers to dolphins, porpoises, or marine mammals.

Sec. 216.92 Dolphin-safe requirements for tuna harvested in the ETP by large purse seine vessels.

(a) U.S. vessels. Tuna products that contain tuna harvested by U.S. flag purse seine vessels of greater than 400 st (362.8 mt) carrying capacity in the ETP may be labeled ``dolphin-safe'' if the following requirements are met:

(1) ``Dolphin-safe'' Tuna Tracking Forms certified by the vessel captain and the observer are submitted to the Regional Administrator, Southwest Region, at the end of the fishing trip during which the tuna was harvested;

(2) The tuna has been processed by a U.S. tuna processor in a plant located in one of the 50 states, Puerto Rico, or American Samoa that is in compliance with the tuna tracking and verification requirements of Sec. 216.94;

(3) The tuna or tuna products are accompanied by a properly completed FCO;

(4) The tuna or tuna products meet the dolphin-safe labeling standards under Sec. 216.91; and

(5) The FCO is properly endorsed by each processor certifying that, to the best of his or her knowledge and belief, the FCO and attached documentation are complete and accurate.

(b) Imported tuna. Tuna or tuna products harvested in the ETP by purse seine vessels of greater than 400 st (362.8 mt) carrying capacity and presented for import into the United States are dolphin safe if:

(1) The tuna was harvested by a U.S. vessel fishing in compliance with the requirements of the IDCP and applicable U.S. law, or by a vessel belonging to a nation that has obtained an affirmative finding of Sec. 216.24(f)(9);

(2) The tuna or tuna products are accompanied by a properly completed FCO;

(3) The tuna or tuna products are accompanied by valid documentation signed by a representative of the appropriate IDCP member nation, certifying that:

(i) There was an IDCP approved observer on board the vessel(s) during the entire trip(s); and

(ii) The tuna contained in the shipment were caught according to the dolphin-safe labeling standards of Sec. 216.91;

(4) The documentation provided in paragraph(b)(3) of this section includes a listing of vessel names and identifying numbers of the associated Tuna Tracking Forms for each trip of which tuna in the shipment originates; and

(5) The FCO is properly endorsed by each exporter, importer, and processor certifying that, to the best of his or her knowledge and belief, the FCO and attached documentation are complete and accurate.

Sec. 216.93 Submission of documentation.

(a) Requirements for the submission of documents concerning the activities of U.S. flag vessels with greater than 400 st carrying capacity fishing in the ETP are contained in Sec. 216.94.

(b) The import documents required by Secs. 216.91 and 216.92 must accompany the tuna product whenever it is offered for sale or export, except that these documents need not accompany the product when offered for sale if:

(1) The documents do not require further endorsement by any importer or processor and are submitted to officials of the U.S. Customs Service at the time of import; or

(2) the documents are endorsed as required by Sec. 216.92(b)(4) and the final processor delivers the endorsed documents to the Administrator, Southwest Region, or to U.S. Customs as required.

Sec. 216.94 Tracking and verification program.

The Administrator, Southwest Region, has established a national tracking and verification program to accurately document the ``dolphin-safe" condition of tuna, under the standards set forth in Sec. 216.91(a). The tracking program

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includes procedures and reports for use when importing tuna into the U.S. and during U.S. purse seine fishing, processing, and marketing in the U.S. and abroad. Verification of tracking system operations is attained through the establishment of audit and document review requirements. The tracking program is consistent with the international tuna tracking and verification program adopted by the Parties to the IDCP.

(a) Tuna tracking forms. Whenever a U.S. flag tuna purse seine vessel of greater than 400 st (362.8 mt) carrying capacity fishes in the ETP, IDCP approved Tuna Tracking Forms (TTFs), bearing the IATTC cruise number assigned to that trip, are used by the observer to record every set made during that trip. One TTF is used to record ``dolphin-safe'' sets and a second TTF is used to record ``non-dolphin-safe'' sets. The information entered on the TTFs following each set includes date of trip, set number, date of loading, name of the vessel, vessel Captain's name, observer's name, well number, weights by species composition, estimated tons loaded, and date of the set. The observer and the vessel engineer initial the entry for each set, and the vessel Captain and observer review and sign both TTFs at the end of the fishing trip certifying that the information on the form is accurate. The captain's and observer's certification of the TTF on which dolphin-safe sets are recorded complies with 16 U.S.C. 1385(h).

(b) Tracking fishing operations. (1) During ETP fishing trips by purse seine vessels, tuna caught in sets designated as ``dolphin-safe'' by the vessel observer must be stored separately from tuna caught in ``non-dolphin-safe'' sets from the time of capture through unloading, except as provided in paragraph (b)(2) of this section. Vessel personnel will decide into which wells tuna will be loaded. The observer will

initially designate whether each set is ``dolphin-safe'' or not, based on his/her observation of the set. The observer will initially identify a vessel fish well as ``dolphin-safe'' if the first tuna loaded into the well during a trip was captured in a set in which no dolphin died or was seriously injured. The observer will initially identify a vessel fish well as ``non-dolphin-safe'' if the first tuna loaded into the well during a trip was captured in a set in which a dolphin died or was seriously injured. Any tuna loaded into a well previously designated ``non-dolphin-safe'' or ``mixed well'' is considered ``non-dolphin-safe'' tuna. Except as provided for in paragraph (b)(2)(i) of this section, the observer will change the designation of a ``dolphin-safe'' well to ``non-dolphin-safe'' if any tuna are loaded into the well that were captured in a set in which a dolphin died or was seriously injured.

(2) Mixed wells. Only two acceptable conditions exist under which a ``mixed'' well can be created.

(i) In the event that a set has been designated ``dolphin-safe'' by the observer, but during the loading process dolphin mortality or serious injury is identified, the ``dolphin-safe'' designation of the set will change to ``non-dolphin-safe.'' If one or more of the wells into which the newly designated ``non-dolphin-safe'' tuna are loaded already contains ``dolphin-safe'' tuna loaded during a previous set, the observer will note in his or her trip records the well numbers and the estimated weight of such ``non-dolphin-safe'' tuna and designate such well(s) as ``mixed well(s).'' Once a well has been identified as ``non-dolphin-safe'' or ``mixed'' all tuna subsequently loaded into that well will be designated as ``non-dolphin-safe.'' When the contents of such a ``mixed well'' are received by a processor, the tuna will be weighed and separated according to the observer's report of the estimated weight of ``dolphin-safe'' and ``non-dolphin-safe'' tuna contained in that well. In addition, 15

percent of the ``dolphin-safe'' tuna unloaded from the ``mixed well'' will be designated as ``non-dolphin-safe.''

(ii) Near the end of an ETP fishing trip, if the only well space available is in a ``non-dolphin-safe'' well, and there is an opportunity to make one last set, ``dolphin-safe'' tuna caught in that set may be loaded into the ``non-dolphin-safe'' well. The ``dolphin-safe'' tuna must be kept physically separate from the ``non-dolphin-safe'' tuna already in the well, using netting or other material.

(3) The captain, managing owner, or vessel agent of a U.S. purse seine vessel returning to port from a trip, any part of which included fishing in the ETP, must provide at least 48 hours notice of the vessel's intended place of landing, arrival time, and schedule of unloading to the Administrator, Southwest Region.

(4) If the trip terminates when the vessel enters port to unload part or all of its catch, new TTFs will be assigned to the new trip, and any information concerning tuna retained on the vessel will be recorded as the first entry on the TTFs for the new trip. If the trip is not terminated following a partial unloading, the vessel will retain the original TTFs and submit a copy of those TTFs to the Administrator, Southwest Region, within 5 working days. In either case, the species and amount unloaded will be noted on the respective originals.

(5) Tuna offloaded to trucks, storage facilities or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the ``dolphin-safe'' or ``non-dolphin-safe'' designation of the tuna as it left the fishing vessel.

(6)(i) When ETP caught tuna is to be offloaded from a U.S. purse seiner directly to a U.S. canner within the 50 states, Puerto Rico, or American Samoa, or in any port and subsequently loaded aboard a carrier vessel for transport to a U.S. processing location, a NMFS representative may meet

the U.S. purse seiner to receive the TTFs from the vessel observer and to monitor the handling of ``dolphin-safe'' and ``non-dolphin-safe'' tuna.

(ii) When ETP caught tuna is offloaded from an U.S. purse seiner in any port and subsequently loaded aboard a carrier vessel for transport to a cannery outside the jurisdiction of the United States, a NMFS representative may meet the vessel to receive copies of the TTFs from the observer and monitor the offloading. The U.S. caught tuna becomes the tracking and verification responsibility of the foreign buyer when it is offloaded from the U.S. vessel.

(iii) If a NMFS representative does not meet the vessel in port at the time of arrival, the observer may take the signed TTFs to the IATTC office and mail copies to the Administrator, Southwest Region, from that location within 5 working days of the end of the trip.

(iv) When ETP caught tuna is offloaded from a U.S. purse seiner directly to a processing facility located outside the jurisdiction of the United States in a country that is a party to the IDCP, the national authority in whose area of jurisdiction the tuna is to be processed will assume the responsibility for tracking and verification of the tuna offloaded. A representative of the national authority will receive copies of the TTFs from the observer, and copies of the TTFs will be forwarded to the Administrator, Southwest Region.

(c) Tracking cannery operations. (1) Whenever a tuna canning company in the 50 states, Puerto Rico, or American Samoa is scheduled to receive a domestic or imported shipment of ETP caught tuna for processing, the company must provide at least 48 hours notice of the location and arrival date and time of such a shipment, to the Administrator, Southwest Region, so that a NMFS representative can be present to monitor delivery and verify that ``dolphin-safe'' and ``non-dolphin-safe'' tuna are clearly identified and remain segregated.

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(2) At the close of delivery activities, which may include weighing, boxing or containerizing, and transfer to cold storage or processing, the company must provide a copy of the processor's receiving report to the NMFS representative, if present. If a NMFS representative is not present, the company must submit a copy of the processor's receiving report to the Administrator, Southwest Region, electronically, by mail, or by fax within 5 working days. The processor's receiving report must contain, at a minimum: date of delivery, catcher vessel name and flag, trip number and dates, storage container number(s), ``dolphin-safe'' or ``non-dolphin-safe'' designation of each container, species, product description, and weight of tuna in each container.

(3) Tuna canning companies will report on a monthly basis the amounts of ETP-caught tuna that are removed from cold storage. This report may be submitted in conjunction with the monthly report required in paragraph (c)(5) of this section. This report must contain:

(i) The date of removal;

(ii) Storage container number(s) and ``dolphin-safe'' or ``non-dolphin-safe'' designation of each container; and

(iii) Details of the disposition of fish (for example, canning, sale, rejection, etc.).

(4) During canning activities, ``non-dolphin-safe'' tuna may not be mixed in any manner or at any time in its processing with any ``dolphin-safe'' tuna or tuna products and may not share the same storage containers, cookers, conveyers, tables, or other canning and labeling machinery.

(5) Canned tuna processors must submit a report to the Administrator, Southwest Region, of all tuna received at their processing facilities in each calendar month whether or not the tuna is actually canned or stored during that month. Monthly cannery receipt reports must be submitted

electronically or by mail before the last day of the month following the month being reported. Monthly reports must contain the following information:

(i) Domestic receipts: species, condition (round, loin, dressed, gilled and gutted, other), weight in short tons to the fourth decimal, ocean area of capture (eastern tropical Pacific, western Pacific, Indian, eastern and western Atlantic, other), catcher vessel, trip dates, carrier name, unloading dates, and location of unloading.

(ii) Import receipts: In addition to the information required in paragraph (c)(5)(i) of this section, a copy of the FCO for each imported receipt must be provided.

(d) Tracking imports. All tuna products, except fresh tuna, that are imported into the United States must be accompanied by a properly certified FCO as required by Sec. 216.24(f).

(e) Verification requirements.--(1) Record maintenance. Any exporter, transshipper, importer, or processor of any tuna or tuna products containing tuna harvested in the ETP must maintain records related to that tuna for at least 3 years. These records include, but are not limited to: FCO and required certifications, any report required in paragraph (a) and (b) of this section, invoices, other import documents, and trip reports.

(2) Record submission. Within 30 days of receiving a written request from the Administrator, Southwest Region, any exporter, transshipper, importer, or processor of any tuna or tuna products containing tuna harvested in the ETP must submit to the Administrator any record required to be maintained under paragraph (e)(1) of this section.

(3) Audits and spot-checks. Upon request of the Administrator, Southwest Region, any such exporter, transshipper, importer, or processor must provide the Administrator, Southwest Region, timely access to all pertinent records and facilities to allow for audits and spot-checks on caught, landed, and processed tuna.

APPENDIX G

LA JOLLA AGREEMENT
FOR THE REDUCTION OF DOLPHIN MORTALITY IN THE EASTERN PACIFIC OCEAN

The governments listed in Appendix I recall and reaffirm the resolution adopted during a Special Meeting of the Inter-American Tropical Tuna Commission (IATTC) held in La Jolla, California, on April 21-23,1992, to adopt a multilateral program with the objectives of (1) progressively reducing dolphin mortality in the eastern Pacific Ocean (EPO) fishery to levels approaching zero through the setting of annual limits and (2), with a goal of eliminating dolphin mortality in this fishery, seeking ecologically sound means of capturing large yellowfin tunas not in association with dolphins while maintaining the populations of yellowfin tuna in the EPO at a level which will permit maximum sustained catches year after year, and to limit and, if possible, eliminate the mortality of dolphins in the fishery of the EPO as follows:

Year	Limit	Percentage of best estimate of current populations of spotted, spinner, and common dolphins
1993	19,500	0.30
1994	15,500	0.24
1995	12,000	0.19
1996	9,000	0.14
1997	7,500	0.11
1998	6,500	0.10
1999	<5,000	<0.08

The IATTC further resolved to establish a Review Panel to review and report on the compliance of the international fleet with the mortality limits set forth above, and make recommendations as appropriate, and to establish within the IATTC an Advisory Board of technical specialists from the international communities of scientists, government agencies, environmental groups, and the fishing industry, to assist the Director of the IATTC in efforts to coordinate, facilitate, and guide research.

Therefore:

The governments listed in Appendix I agree that:

1. Each government that is a party to this Agreement ("the participating governments") shall, on or before October 1, 1992, provide to the Director of the IATTC a list of purse-seine vessels of carrying capacity greater than 400 short tons under its jurisdiction which such government has reasonable cause to believe will set on tunas associated with dolphins in the EPO in 1993 and for each of which the government wishes to have a Dolphin Mortality Limit (DML) assigned for that year.

2. The Review Panel to be established in accordance with the Resolution of April 1992, whose duties, functions, and responsibilities are defined in Appendix II, shall, by November 1, 1992, assign a DML to each vessel that it determines to be "qualified" for a DML, in accordance with Paragraph 1 ("qualified vessels"). For 1993, each DML, shall be equivalent to 19,500 divided by the total number of qualified vessels.

3. A participating government may thereafter adjust the DMLs of its qualified vessels either upward or downward,

provided that no vessel is assigned an adjusted DML, in excess of 15 percent above the original DML, and that the collective DMLs for that nation's fleet do not exceed that nation's collective DMLs prior to adjustment. Any such adjustment shall be made prior to December 1, 1992. Each government shall notify the IATTC of any such adjustments on or before December 15, 1992. DMLs that are assigned as of December 1, 1992, shall be applied during 1993.

4. Any vessel assigned a DML for 1993 which does not utilize any of its DML by June 1, 1993, or which leaves the fishery, shall lose its right to utilize its DML for the remainder of the year. The IATTC shall maintain records of all such unutilized DMLs.

5. Each participating government shall, on or before April 1, 1993, provide to the Director of the IATTC the names of purse-seine vessels which were not assigned a DML under Paragraph 2 and to which it wishes to have a DML assigned for the last six months of 1993. All such vessels which are qualified shall be assigned DMLs by the Director of the IATTC, after consultation with the voting members of the Review Panel, as soon as possible after June 1, 1993. The DML shall be calculated by dividing the sum of the unutilized DMLs by the total number of such applications, provided that the DML for any such vessel shall not exceed one-half of the DML, calculated in accordance with Paragraph 2.

6. For any vessel exceeding its DML during 1993, the amount of its excess shall be deducted from the DML assigned to that vessel during 1994 and, if the excess in 1993 exceeds the 1994 DML, then such excess shall be deducted from the DMLs subsequent to 1994, as appropriate.

7. Only vessels operating under the jurisdiction of participating governments or under the jurisdiction of the governments of IATTC member countries are eligible for DMLs.

8. Compliance with the total EPO dolphin mortality limits for the years 1994 through 1999 shall be ensured through the mechanisms set forth above for 1993, with any necessary modifications.

9. The participating governments shall review and assess the 1993 compliance mechanisms prior to July 1, 1993.

10. Measures shall be taken with respect to management of individual stocks of dolphins in accordance with Appendix III.

11. The Scientific Advisory Board of technical experts to coordinate, facilitate, and guide research in accordance with the Resolution of April 1992 shall be established and operate as outlined in Appendix IV.

12. The participating governments shall require purse-seine vessels of carrying capacity greater than 400 short tons under their jurisdiction which operate in the EPO to carry an observer during each fishing trip in 1993. At least 50 percent of the observers shall be from the observer program of the IATTC.

13. The participating governments shall permit observers to collect all pertinent information necessary to achieve the objectives of this Agreement.

14. The participating governments shall require observers to inform the fishing captain of the vessel upon which he is observing when the DML is reached and when fishing by

that vessel for yellowfin tuna association with dolphins should cease.

15. The participating governments shall require that a vessel shall cease fishing on dolphins in the EPO when its DML has been reached.

The participating governments recommend that all IATTC member countries and other states party to this Agreement work diligently to achieve the objectives of this Agreement and particularly strive to undertake measures to insure that states not currently party to this Agreement, but which have vessels capable of and intending to fish for tunas in association with dolphins in the eastern Pacific Ocean subscribe to the Agreement.

APPENDICES

Appendix 1

Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Spain, the United States of America, Vanuatu, Venezuela.

Appendix II

THE REVIEW PANEL

I. OBJECTIVES

This Review Panel is established as recommended by the Resolution approved at the Special Meeting of the IATTC held on April 21-23, 1992, to review and report on the compliance of the international fleet with the mortality limits set forth and to make recommendations as appropriate.

II. FUNCTIONS AND RESPONSIBILITIES

The Review Panel shall:

1. Compile each year a list of vessels qualified for Dolphin Mortality Limits (DML) and assign DMLs for each year from 1993 through 1999.

2. Review all trips made in the eastern Pacific Ocean by purse-seine vessels of fish-carrying capacity greater than 400 short tons.

3. Identify all infractions of agreements concerning dolphin mortality, including this Agreement and a Resolution passed at the 50th Meeting of the IATTC.

4. Inform the governments which are parties to such agreements or the said Resolution of infractions by vessels under their jurisdiction.

5. Receive from governments party to the above-mentioned Resolutions or this Agreement and whose vessels fish for tunas in association with dolphins in the eastern Pacific Ocean information concerning their actions in response to reported infractions for the purposes of monitoring compliance.

6. Recommend to all such governments a standardized certification system for fishing captains and maintain a list of those who have received adequate training and who are abiding by the goals of the above Resolution or this Agreement.

7. Recommend to all such governments a set of sanctions for individual fishing captains, vessel owners, and observers which are consistent with the goals of the above Resolution or this Agreement, appropriate for the infractions, and standardized among countries.

8. Recommend to all such governments minimum standards for fishing gear, update these following technological advances, and maintain a list of vessels which carry all the equipment needed to reduce dolphin mortality and which have performed the required procedures to maintain the vessel and the gear in good working condition.

9. Recommend to all such governments actions to be taken in order to ensure compliance with the above Resolution or this Agreement by any nation not a party to either that is conducting fishing operations in a manner inconsistent with the above Resolution or this Agreement.

10. Publish an Annual Report which would:

a) Review the operation of the program and recommend actions to the such governments for modifications and updates in enforcement consistent with the goals of the above Resolution or this Agreement.

b) Summarize all the identified infractions and the action taken.

III. COMPOSITION OF THE PANEL

The Review Panel will be composed of nine members, five of whom shall be representatives of resolving governments with vessels participating in the fishery. The remaining members of the Panel shall consist of two representatives of environmental organizations and two representatives of the tuna-fishing industry, to be selected by government representatives on the Panel. The five government representatives shall be voting members; the four non-governmental representatives shall be non-voting members. The IATTC will provide a non-voting Secretariat for the Panel.

IV. OPERATION OF THE PANEL

The Panel shall adopt rules of procedure for its operations at its first meeting. After each meeting a report of infractions and related matters shall be made available to the public. The Panel will prepare an annual report on its activities. The proceedings of the Panel will not be public, and its members shall not divulge any information concerning individual vessels and operators derived from review forms or from the proceedings of the Panel. Information concerning compliance with the terms of the Agreement will be made public by means of the Panel's Reports.

Appendix III

Protective measures for each individual stock of dolphins should be taken as follows:

i) If the incidental mortality of any stock exceeds 2% of the most current estimate of absolute abundance (CEAA), but is less than 4% of that stock, a warning will he issued to all fleets;

ii) If the incidental mortality of any stock exceeds 2% of the CEAA but is less than 4% in two consecutive years all sets on that stock, whether in herds which contain only individuals of that stock or in mixed herds, would be banned for a year.

iii) If the incidental mortality of any stock reaches or exceeds 4% of the CEAA in a given year, a complete ban on setting on that stock would be imposed for the following year.

iv) If the incidental mortality of any stock exceeds 6% of the CEAA, the ban on sets would remain in force for three years; for 8%, four years; and for 10%, five years.

It is proposed that the CEAA for the dolphin stocks of the EPO presented by Wade and Gerrodette to the IWC in 1992, based on NMFS research vessel data for the period 1986-1990, be used for all these calculations until the signatory nations agree on an updated set of figures. Such updates could result from the analysis of data from future research cruises, from calibration of indices of relative abundance with estimates of absolute abundance, or from improvements in the analytical methodology applied to currently available data. The 2% value for maximum net annual recruitment should also be changed if better estimates become available.

BACKGROUND

In recent years, incidental mortality for all stocks of dolphins involved in the fishery has been decreasing, and as of 1991 the mortality rates of all stocks are less than 1% of the most recent estimates of their average absolute abundances for 1986-1990. The most conservative estimate of the maximum net annual recruitment rate for dolphins is 2%, so incidental mortality rates below this level should not jeopardize the recovery of the stocks.

The incidental mortalities of the various stocks of dolphins in the EPO in 1991 (based on mortality per set) were as follows:

Stock	Population abundance*	Incidental mortality	Percent mortality
Northeastern spotted	738,100		
Western and/or southern spotted	1,299,300		
All spotted (except coastal)	2,037,400	13,995	0.69
Eastern spinner	632,700	5,879	0.93
Whitebelly spinner	1,020,100	2,974	0.29
Northern common	477,000	161	0.03
Central common	415,600	3,182	0.77
Southern common	2,211,500	115	0.01
Other dolphins	2,729,100	990	0.04
All	9,523,400	27,292	0.29

* Wade and Gerrodette (submitted to the International Whaling Commission, 1992)

Appendix IV

THE SCIENTIFIC ADVISORY BOARD

The Inter-American Tropical Tuna Commission, at its Special Meeting held in La Jolla, California, on April 21-23, 1992, reached agreement on a multilateral program with the objectives of (1) progressively reducing dolphin mortality in the EPO fishery to levels approaching zero through the setting of annual limits and (2), with a goal of eliminating dolphin mortality in this fishery seeking ecologically sound means of capturing large yellowfin tunas not in association with dolphins while maintaining the populations of yellowfin tuna in the EPO at a level which will permit maximum

sustained catches year after year.Based on a recommendation from the IATTC scientific staff, the participating governments approve the establishment of a Scientific Advisory Board of technical specialists to assist the Director in matters regarding research to (a) modify current purse-seine technology to make it less likely to cause dolphin mortality and (b) seek alternative means of capturing large yellowfin tuna.

The functions and responsibilities of the Board shall be to:

1) Meet at least once each year.

2) Review plans, proposals, and programs of the Commission to seek to meet objectives (1) and (2), as noted in paragraph 1 of this document.

3) Provide advice to the Director concerning the design, facilitation, and guidance of research to achieve objectives (1) and (2) noted in Paragraph 1 of this document.

4) Assist the Director in locating sources of funding to conduct such research.

5) Recommend to the Director any other measures and actions that could be taken to facilitate achieving the objectives of the dolphin conservation program defined in the Resolution of the Special Meeting of the IATTC held in La Jolla on April 21-23,1992.

The Board will consist of no more than 10 members, selected from the international community of scientists, fishing gear experts, the fishing industry, and environmentalists. The members will be selected by the Director on the basis of their technical expertise, and subject to approval by the Commission and the participating governments.The secretariat for the Board will be provided by the IATTC.

APPENDIX H

DECLARATION OF PANAMA

The Governments of Belize, Columbia, Costa Rica, Ecuador, France,[1] Honduras, Mexico, Panama, Spain,[2] United States of America, Vanuatu and Venezuela, meeting in Panama City, Republic of Panama on October 4, 1995 hereby reaffirm the commitments and objectives of the La Jolla Agreements of (1) progressively reducing dolphin mortality in the eastern Pacific Ocean (EPO fishery to levels approaching zero through the setting of annual limits and (2) with a goal of eliminating dolphin mortality in this fishery, seeking ecologically sound means of capturing large yellowfin tunas not in association with dolphins;

Recognizing the strong commitments of nations participating in the La Jolla Agreement and the substantial successes realized through the multilateral cooperation and supporting nation action under that Agreement, the Governments meeting in Panama, including those which are, or have announced their intention to become, members of the Inter-American Tropical Tuna Commission (IATTC), announce their intention to formalize by January 31, 1996, the La Jolla Agreement as a binding legal instrument which shall be open to all nations with coastlines bordering the EPO or with vessels fishing for tuna in this region. This shall be accomplished by adoption of the IATTC resolution or other

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[1] Spain and France support the commitments of this Declaration under reservation because of the legislation related to fisheries of the European Union.

[2] Spain maintains a reservation on point number two of the Annex "Market Access," pending further review.

legally binding instrument. The adoption of the IATTC resolution or other legally binding instrument , that utilizes to the maximum extent possible the existing structure of the IATTC, is contingent upon the enactment of changes in United States law as envisioned in Annex 1 to this Declaration. The binding legal instrument shall build upon the strengths and achievements of the La Jolla Agreement, the working groups established under it, and the actions of the Governments participating in that Agreement, its appendices, and the decisions of the Governments under that Agreement as modified to achieve the objectives and commitments contained herein;

The Governments meeting in Panama agree that in concluding, adopting, and implementing this binding legal instrument, they will:

Commit to the conservation of ecosystems and the sustainable use of living marine resources related to the tuna fishery within the EPO. Adopt conservation and management measures that ensure the long-term sustainability of tuna stocks and other stocks of living marine resources in the EPO. Such measures shall be based on the best scientific evidence, including that based on a precautionary methodology, and shall be designed to maintain or restore the biomass of harvested stocks at or above levels capable of producing maximum sustainable yield, and with the goal to maintain or restore the biomass of associated stocks at or above levels capable of producing maximum sustainable yield. These measures and methodology should take into consideration, and account for, natural variation, recruitment rate, individual growth rate, populations parameters K and r, and scientific uncertainty.

Commit, according to their capacities and in coordination with the IATTC, to the assessment of the catch ~~and by~~catch

of juvenile yellowfin tuna and other stocks of living marine resources related to the tuna fishery in the EPO and the establishment of measures to inter alia, avoid, reduce and minimize the bycatch of juvenile yellowfin tuna and bycatch of non-target species, in order to ensure the long-term sustainability of all these species, taking into consideration the interrelationships among species in the ecosystem.

Commit in the exercise of their national sovereignty to enact and enforce this instrument through domestic legislation and/or regulation, as appropriate.

Adopt cooperative measures to ensure compliance with this instrument building upon decision IGM 6/93, Appendix IV, "Guiding Principles Respecting Relationships between States Both Party and Non-Party to the Agreement," taken by the nations participating in the La Jolla Agreement Working Group on Compliance, building upon decision IGM 6/93, Appendix V, "Options for Action Against Nations Not Complying With the Agreement."

Enhance the practice of reviewing and reporting on compliance with this instrument, building upon past practices under the La Jolla Agreement.

Establish a per-stock per-year cap of between 0.2% of the Minimum Estimated Abundance (Nmin) (as calculated by the U.S. National Marine Fisheries Service or equivalent calculation standard) and 0.1% of Nmin, but in no event shall the total annual mortality exceed 5000 consistent with the commitments and objectives stated in the preamble above. In the year 2001, the per-stock, per-year cap shall be 0.1% of Nmin.

Conduct in 1998 a scientific review and assessment of progress toward the year 2001 objective, and consider

recommendations as appropriate. Up to the year 2001, in the event that annual mortality of 0.2% of Nmin is exceeded for any stock, all sets on that stock and on any mixed schools containing members of that stock shall cease for that fishing year. Beginning in the year 2001, in the event that annual mortality of 0.1% of Nmin for any stock exceeded, all sets on that stock and on any mixed schools containing members of that stock shall cease for that fishing year. In the event that annual mortality of 0.1% of Nmin is exceeded for either Eastern Spinner or Northeastern Spotted dolphin stocks, the governments commit to conduct a scientific review and assessment and consider further recommendations.

Establish a per-vessel maximum annual DML consistent with the established per-year mortality caps.

Establish a system that provides incentives to vessel captains to continue to reduce dolphin mortality, with the goal of eliminating dolphin mortality in the EPO.

Establish or strengthen National Scientific Advisory Committees (NATSAC), or the equivalent, of qualified experts, operating in their individual capacities, which shall advise their respective governments on mechanisms to facilitate research, and on the formulation of recommendations for achieving the objectives and commitments contained herein, or strengthen existing structures in order to conform with the requirements delineated herein. Membership to NATSACs shall include, inter alia, qualified scientists from the public and private sector and NGOs. The NATSAC's shall:

1. Receive and review data, including data provided to national authorities by IATTC

2. Advise and recommend to their governments

measures and actions that should be undertaken to conserve and manage the stocks of living marine resources of the EPO;

3. Make recommendations to their governments regarding research needs, including ecosystems; fishing practices; and gear technology research, including the development and use of selective , environmentally safe and cost-effective fishing gear; and the coordination and facilitation of such research;

4. Conduct scientific reviews and assessments by the year 1998 regarding progress toward the year 2001 objective stated above, and make appropriate recommendations to their governments concerning these reviews and assessments, as well as additional assessments in the year 2001 as provided above,

5. Consult other experts as needed;

6. Assure the regular and timely full exchange of data among the parties and NATSACs on catch of tuna and associated species and bycatch, including dolphin mortality data, for the purposes of developing conservation and management recommendation to their governments as well as recommendations for enforcement and scientific research while not violating the confidentially of business-confidential data;

7. Establish procedures to, inter alia, hold public meetings, and maintain the confidentiality of business-confidential data.

Reports of NATSACs, including of their cooperative meetings, shall be available to the parties and the public.

The NATSACs shall cooperate, through regular and timely meetings, including at a minimum in conjunction with the meeting of the IATTC, in the review of data and the status of stocks, and in the development of advice for achieving the objectives and commitments contained herein.

Promote transparency in their implementation of this Declaration, including through public participation as appropriate.

As soon as possible, the nations of the Intergovernmental Group convened under the auspices of the IATTC will initiate discussions related to a new, permanent binding instrument.

[signed by representatives of the Governments of Belize, Columbia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, United States of America, Vanuatu and Venezuela]

ANNEX I

Envisioned changes in United States law

1. Primary and Secondary Embargoes: Effectively lifted for tuna caught in compliance with the La Jolla Agreement as formalized and modified through the processes set forth in the Panama Declaration.

2. Market Access: Effectively opened to tuna caught in compliance with the La Jolla Agreement as formalized and modified through the processes set forth in the Panama Declaration with respect to States include: IATTC Member States and other States that have initiated steps, in accordance with Article 5.3 of the IATTC Convention, to become members of that organization.

3. Labeling: The term "dolphin safe" may not be used for any tuna caught in the EPO by a purse-seine vessel in a set in whcih a dolphin mortality occurred as documented by observers by weight calculation and well location.

ANNEX II

APPENDIX IV

Guiding Principles respecting relationships between States both Party and Non-Party to the Agreement

The Parties to the Agreement incorporate into the Agreement a guiding principle that no Party shall act in a manner that assists Non-Parties to avoid compliance with the objectives of the Agreement.

When a coastal state that is a Party issues a license to engage in fishing in its Exclusive Economic Zone portion of the eastern Pacific Ocean (EPO), either directly of through a licensing agreement, to a vessel of a Non-Party, the license should be subject to the provisions of the Agreement.

The Parties should consider prohibiting persons under their jurisdiction from assisting in any way vessels of non-complying Parties or Non-Parties operating in the fishery.

Any state whose vessels are conducting purse-seine tuna-fishing operations in the EPO should be invited to join the Agreement. The Parties should draw the attention of any state that is not a party to the Agreement to any activity undertaken by its nationals or vessels which, in the opinion of the Parties, affects the implementation of the objectives of the Agreement.

APPENDIX V

Options for Action With Respect to Nations Party to the Agreement

Diplomatic actions:

Collective representation to the non-complying nation. This would constitute a communication emanating from plenary meeting of the participating nations after consultation with the non-complying nation. Diplomatic communication. Each participating nation, acting individually or in concert with other nations, would undertake a diplomatic demarche to the non-complying nation.

Public opinion actions:

Dissemination of information regarding the non-compliance of the nation to the public through appropriate media, e.g., a press conference.

Operational restrictions:

Denial of access to the Exclusive Economic Zones of nations party to the Agreement for fishing operations by tuna fishing vessels of the non-complying nation. The scope of this action would have to be determined by the International Review Panel (IRP) by defining what constitutes a tuna-fishing vessel, i.e., vessels covered by the Agreement, or other tuna-fishing vessels as well. This action should not restrict freedom of navigation or other rights of vessels under international law. Restriction of access to ports and port servicing facilities for tuna-fishing vessels of the non-complying nation. This would not apply to vessels in distress. Refusal of logistical support and/or supplies to tuna-fishing vessels of the non-complying nation. Reduction of Dolphin Mortality Limits (DMLs) to all vessels of the non-complying Party by specified percentages. DMLs would be

restored immediately upon a determination that the nation is compliance.

Economic sanctions:

Trade measures: The Working Group discussed at length trade measures against non-complying nations. These might include embargoes or other restrictions on the imports of, for example, tuna, other fish products, other marine products, or other products. The consideration of such measures was recognized to be an extremely delicate and evolving policy issue for which few guidelines exist in international law. The Working Group noted ongoing discussions concerning this issue in other international for. In light of these considerations, the Working Group agreed that trade measures should receive further review by the Parties prior to making and recommendation in this respect. Fines (monetary penalties): The Working Group considered that the IRP should identify procedures for imposing fines, including defining the value of the fines (this could be based on a percentage of the amount of the commercial value of the catch), and the destination of the fines (e.g. an international trust fund) as issues that the Parties should discuss. The Working Group noted that there apparently is no precedent of such fines.

Options for Action With Respect to Nations Not Party to the Agreement

Diplomatic actions:

Collective representation to the non-party. This would constitute a communication emanating from a plenary meeting of the participating nations after consultation with the Non-Party. Diplomatic communication. Each participating nation, acting individually or in concert with

other nations, would undertake a diplomatic demarche to the Non-Party.

Public opinion actions:

Dissemination of information regarding the non-compliance of the nation to the public through appropriate media, e.g., a press conference.

Operational restrictions:

Restriction of access to ports and port servicing facilities for tuna-fishing vessels of the non-Party. The scope of this action would have to be determined by the IRP by defining what constitutes a tuna-fishing vessel, i.e. solely vessels covered by the Agreement, or other tuna-fishing vessels as well. This action should not restrict freedom of navigation and other rights of vessels under international law, and particularly would not apply to vessels in distress. Refusal of logistical support and/or supplies to tuna fishing vessels of the non-party nation. Prohibiting nationals from assisting in any way vessels of the Non-Party operating in the fishery.

Economic sanctions:

The Working Group noted that economic sanctions with respect to non-parties call into consideration all the issues raised above with respect to the imposition of such sanctions on Parties, and noted that the imposition of such sanctions with respect to Non-Parties involves additional complex legal considerations. The Working Group recommends that the Parties consider whether such sanctions against Non-Parties are an appropriate means of promoting compliance with the objectives of the Agreement and whether they are consistent with international law.

APPENDIX I

AGREEMENT ON THE INTERNATIONAL DOLPHIN CONSERVATION PROGRAM

Preamble

The Parties to this Agreement,

Aware that, in accordance with the relevant provisions of international law, as reflected in the United Nations Convention on the Law of the Sea (UNCLOS) of 1982, all States have the duty to take, or to cooperate with other States in taking, such measures as may be necessary for the conservation and management of living marine resources;

Inspired by the principles contained in the Rio Declaration on Environment and Development of 1992, as well as the wish to implement the principles and standards of the Code of Conduct for Responsible Fisheries adopted by the FAO Conference in 1995;

Stressing the political will of the international community to contribute to enhancing the effectiveness of fisheries conservation and management measures, through the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted by the FAO Conference in 1993;

Taking note that the 50th General Assembly of the United Nations, pursuant to resolution A/RES/50/24, adopted the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Stocks and Highly Migratory

Fish Stocks ("the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks");

Reaffirming the commitments established in the La Jolla Agreement of 1992 and in the Declaration of Panama of 1995;

Emphasizing the goals of eliminating dolphin mortality in the purse-seine tuna fishery in the eastern Pacific Ocean and of seeking ecologically sound means of capturing large yellowfin tunas not in association with dolphins;

Considering the importance of the tuna fishery as a source of food and income for the populations of the Parties and that conservation and management measures must address those needs and take into account the economic and social impacts of those measures;

Recognizing the dramatic reduction of incidental dolphin mortality achieved through the La Jolla Agreement;

Convinced that scientific evidence demonstrates that the technique of fishing for tuna in association with dolphins, in compliance with the regulations and procedures established under the La Jolla Agreement and reflected in the Declaration of Panama, has provided an effective method for the protection of dolphins and rational use of tuna resources in the eastern Pacific Ocean;

Reaffirming that multilateral cooperation constitutes the most effective means for achieving the objectives of conservation and sustainable use of living marine resources;

Committed to ensure the sustainability of tuna stocks in the eastern Pacific Ocean and to progressively reduce the incidental dolphin mortalities in the tuna fishery of the eastern Pacific Ocean to levels approaching zero; to avoid, reduce and minimize the incidental catch and the discard of

juvenile tuna and the incidental catch of non-target species, taking into consideration the interrelationship among species in the ecosystem;

Have agreed as follows:

Article I Definitions

For the purposes of this Agreement:

1. "Tuna" means the species of the suborder Scombroidei (Klawe, 1980), with the exception of the genus Scomber.

2. "Dolphins" means species of the family Delphinidae associated with the fishery for yellowfin tuna in the Agreement Area.

3. "Vessel" means a vessel that fishes for tuna with a purse seine.

4. "Parties" means the States or regional economic integration organizations which have consented to be bound by this Agreement and for which this Agreement is in force.

5. "Regional economic integration organization" means a regional economic integration organization to which its member States have transferred competence over matters covered by this Agreement, including the authority to make decisions binding on its member States in respect of those matters;

6. "IATTC" means the Inter-American Tropical Tuna Commission.

7. "La Jolla Agreement" means the instrument adopted at the Intergovernmental Meeting held in June, 1992.

8. "International Dolphin Conservation Program" means the international program established pursuant to this Agreement based on the La Jolla Agreement, as formalized, modified and enhanced in accordance with the Declaration of Panama.

9. "On-Board Observer Program" means the program defined in Annex II.

10. "Declaration of Panama" means the Declaration signed in Panama City, Republic of Panama, on October 4, 1995.

11. "Director" means the Director of Investigations of the IATTC.

Article II Objectives

The objectives of this Agreement are:

1. To progressively reduce incidental dolphin mortalities in the tuna purse-seine fishery in the Agreement Area to levels approaching zero, through the setting of annual limits;

2. With the goal of eliminating dolphin mortality in this fishery, to seek ecologically sound means of capturing large yellowfin tunas not in association with dolphins; and

3. To ensure the long-term sustainability of the tuna stocks in the Agreement Area, as well as that of the living marine resources related to this fishery, taking into consideration the interrelationship among species in the ecosystem, with special emphasis on, *inter alia*, avoiding, reducing and minimizing bycatch and discards of juvenile tunas and non-target species.

Article III Area of Application of the Agreement

The area of application of this Agreement ("the Agreement Area") is defined in Annex I.

Article IV General Measures

The Parties shall, within the framework of the IATTC:

1. Take measures to ensure the conservation of ecosystems as well as conservation and management measures to ensure the long-term sustainability of tuna stocks and other stocks of living marine resources associated with the tuna purse-seine fishery in the Agreement Area, based on the best scientific evidence available, and apply the precautionary approach, consistent with the relevant provisions of the FAO Code of Conduct for Responsible Fisheries and the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks. Such measures shall be designed to maintain or restore the biomass of harvested stocks at or above levels capable of producing maximum sustainable yield, and with the goal of maintaining or restoring the biomass of associated stocks at or above levels capable of producing maximum sustainable yield; and

2. Take measures, according to their capacities, to assess the catch and bycatch of juvenile yellowfin tuna and other stocks of living marine resources related to the purse-seine tuna fishery in the Agreement Area and establish measures in accordance with Article VI to, *inter alia*, avoid,

reduce and minimize the bycatch of juvenile yellowfin tuna and bycatch of non-target species, in order to ensure long-term sustainability of all these species, taking into consideration the interrelationships among species in the ecosystem.

Article V International Dolphin Conservation Program

Pursuant to the International Dolphin Conservation Program and in consideration of the objective of this Agreement, the Parties shall, *inter alia*:

1. Limit total incidental dolphin mortality in the purse-seine tuna fishery in the Agreement Area to no more than 5,000 annually, through the adoption and implementation of relevant measures, which shall include:

    a. The establishment of a system that provides incentives to vessel captains to continue to reduce incidental dolphin mortality, with the goal of eliminating dolphin mortality in this fishery;

    b. The establishment within the framework of the IATTC of a system of technical training and certification for fishing captains and crews on the gear and its use, as well as the techniques for the rescue and safety of dolphins;

    c. Within the framework of the IATTC, the promotion and support of research to improve gear, equipment, and fishing techniques,

including those used in the fishery for tunas associated with dolphins;

d. The establishment of an equitable system for the assignment of dolphin mortality limits (DMLs), consistent with the per-year dolphin mortality caps, in accordance with Annexes III and IV;

e. Requiring their respective vessels that have been assigned a DML, or that otherwise operate in the Agreement Area, to comply with the operational requirements set forth in Annex VIII;

f. The establishment of a system for the tracking and verification of tuna harvested with and without mortality or serious injury of dolphins, based on the elements set forth in Annex IX;

g. The exchange of scientific research data collected by the Parties pursuant to this Agreement on a full and timely basis; and

h. The conduct of research for the purpose of seeking ecologically sound means of capturing large yellowfin tunas not in association with dolphins;

2. Establish per-stock per-year dolphin mortality caps, and review and assess the effects of these caps, in accordance with Annex III; and

3. Review the measures at a Meeting of the Parties.

Article VI: Sustainability of Living Marine Resources

Pursuant to Article IV, the Parties commit to develop and implement, within the framework of the IATTC, measures to ensure the long-term sustainability of living marine resources associated with the purse-seine tuna fishery in the Agreement Area, taking into consideration the interrelationships among species in the ecosystem. To this end, the Parties shall, *inter alia*:

1. Develop and implement a program for assessing, monitoring and minimizing bycatch of juvenile tuna and non-target species in the Agreement Area;

2. To the maximum extent practicable, develop and require the use of selective, environmentally safe and cost-effective fishing gear and techniques;

3. Require that their vessels operating in the Agreement Area release alive incidentally caught sea turtles and other threatened or endangered species, to the maximum extent practicable; and

4. Request the IATTC to initiate investigations to assess whether the fishing capacity of vessels fishing in the Agreement Area poses a threat to the sustainability of tuna stocks and other living marine resources associated with the fishery and, if so, examine possible measures and recommend their adoption whenever appropriate.

Article VII Implementation at the National Level

Each Party shall adopt, in accordance with its laws and procedures, the necessary measures to ensure the implementation of and compliance with this Agreement including, as appropriate, the adoption of relevant laws and regulations.

Article VIII Meeting of the Parties

1. The Parties shall meet periodically to consider matters pertaining to the implementation of this Agreement and to make all decisions relevant thereto.

2. The ordinary Meeting of the Parties shall take place at least once a year, preferably in conjunction with an IATTC meeting.

3. The Parties may also hold extraordinary meetings when deemed necessary. These meetings shall be convened at the request of any Party, provided that such request is supported by a majority of the Parties.

4. The Meeting of the Parties shall be held when a quorum is present. Quorum is reached when a majority of the Parties are present. This rule shall also apply to meetings of subsidiary organs established under this Agreement.

5. The meetings shall be held in Spanish and English, and the documents of the Meeting of the Parties shall be produced in both these languages.

Article IX Decision Making

All decisions made by the Parties at meetings convened pursuant to Article VIII shall be by consensus.

Article X Scientific Advisory Board

The functions of the Scientific Advisory Board, established pursuant to the La Jolla Agreement, shall be those set forth in Annex V. The Scientific Advisory Board shall be

composed and shall operate in accordance with the provisions of Annex V.

Article XI National Scientific Advisory Committees

1. Each Party shall, in accordance with its laws and procedures, establish a National Scientific Advisory Committee (NATSAC) of qualified experts, operating in their individual capacities, from the public and private sectors, and from non-governmental organizations including, *inter alia*, qualified scientists.

2. The functions of the NATSACs shall be, *inter alia*, those set forth in Annex VI.

3. The Parties shall ensure that the NATSACs shall cooperate through regular and timely meetings in the review of data and the status of stocks, and in the development of advice for achieving the objectives of this Agreement. Such meetings shall take place at least once a year in conjunction with an ordinary Meeting of the Parties.

Article XII International Review Panel

The functions of the International Review Panel (IRP), established pursuant to the La Jolla Agreement, shall be those set forth in Annex VII. The IRP shall be composed and shall operate in accordance with the provisions of Annex VII.

Article XIII On-Board Observer Program

The On-Board Observer Program established pursuant to the La Jolla Agreement shall operate in accordance with Annex II.

Article XIV Role of the IATTC

Envisioning that the IATTC shall have an integral role in coordinating the implementation of this Agreement, the Parties shall, *inter alia*, request the IATTC to provide Secretariat support and to perform such other functions as are set forth in this Agreement or are agreed upon pursuant to this Agreement.

Article XV Financing

The Parties shall contribute to the expenses necessary to achieve the objectives of this Agreement, through the establishment and collection of vessel fees, the level of which shall be determined by the Parties, without prejudice to other voluntary financial contributions.

Article XVI Compliance

1. Each Party shall ensure with respect to vessels under its jurisdiction effective compliance with the measures set forth in this Agreement or adopted pursuant thereto. In particular, each Party shall ensure, through, *inter alia*, an annual certification and inspection program, that vessels under its jurisdiction comply with:

    a. the operational requirements established in Annex VIII; and

    b. the on-board observer requirements established in Annex II.

2. In respect of violations, each Party, taking into consideration the recommendations of the IRP, shall apply, consistent with its national laws, sanctions of sufficient gravity as to be effective in securing compliance with the provisions of this Agreement

and of measures adopted pursuant thereto and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offenses, include refusal, suspension or withdrawal of the authorization to fish.

3. The Parties shall establish incentives for the captains and crews of vessels, with the view to enhancing compliance with this Agreement and its objectives.

4. The Parties shall adopt cooperative measures to ensure compliance with this Agreement, building on decisions that have been taken under the La Jolla Agreement.

5. Each Party shall promptly inform the IRP of enforcement actions it has taken pursuant to this Agreement, and the results thereof.

Article XVII Transparency

1. The Parties shall promote transparency in the implementation of this Agreement, including through public participation, as appropriate.

2. Representatives from intergovernmental organizations and representatives from non-governmental organizations concerned with matters relevant to the implementation of this Agreement shall be afforded the opportunity to take part in meetings of the Parties convened pursuant to Article VIII as observers or otherwise, as appropriate, in accordance with the guidelines and criteria set forth in Annex X. Such intergovernmental organizations and non-governmental organizations shall have timely access to relevant information, subject to

procedural rules on access to such information that the Parties may adopt.

Article XVIII Confidentiality

1. The Meeting of the Parties shall establish rules of confidentiality for all bodies given access to information pursuant to this Agreement.

2. Notwithstanding any confidentiality rules which may be adopted in accordance with paragraph 1 above, any persons with access to such confidential information may disclose such information in connection with legal or administrative proceedings, if requested by a competent authority of the Party concerned.

Article XIX Cooperation with other Organizations or Arrangements

The Parties shall cooperate with subregional, regional and global fishery conservation and management organizations and arrangements with the goal of promoting the achievement of the objectives of this Agreement.

Article XX Settlement of Disputes

1. The Parties shall cooperate in order to prevent disputes. Any Party may consult with one or more other Parties about any dispute related to the interpretation or application of the provisions of this Agreement to reach a solution satisfactory to all as quickly as possible.

2. If a dispute is not settled through such consultation within a reasonable period, the Parties in question shall consult among themselves as soon as possible in order to settle the dispute through any peaceful

means they may decide upon in accordance with international law.

Article XXI Rights of States

No provision of this Agreement may be interpreted in such a way as to prejudice or undermine the sovereignty, sovereign rights or jurisdiction exercised by any State in accordance with international law, as well as its position or views with regard to matters relating to the law of the sea.

Article XXII Non-Parties

1. The Parties shall encourage all States and regional economic integration organizations referred to in Article XXIV of this Agreement that are not Parties to become Parties to this Agreement or to adopt laws and regulations consistent with it.

2. The Parties shall cooperate, in accordance with this Agreement and international law, to deter vessels flying the flags of States that are not Parties from carrying out activities that undermine the effectiveness of this Agreement. To this end, the Parties shall, *inter alia*, call to the attention of non-Parties such activities by their vessels.

3. The Parties shall exchange information among themselves, either directly or through the Director, with respect to activities of vessels flying the flags of non-Parties that undermine the effectiveness of this Agreement.

Article XXIII Annexes

The Annexes form an integral part of this Agreement and, unless expressly provided otherwise, a reference to this

Agreement includes a reference to the Annexes relating thereto.

Article XXIV Signature

This Agreement is open for signature at Washington from May 15, 1998, until May 14, 1999 by States with a coastline bordering the Agreement Area and by States or regional economic integration organizations which are members of the IATTC or whose vessels fish for tuna in the Agreement Area while the Agreement is open for signature.

Article XXV Ratification, Acceptance or Approval

This Agreement is subject to ratification, acceptance or approval by the Signatories in accordance with their domestic laws and procedures.

Article XXVI Accession

This Agreement shall remain open to accession by any State or regional economic integration organization that meets the requirements in Article XXIV, or is otherwise invited to accede to the Agreement on the basis of a decision by the Parties.

Article XXVII Entry into Force

1. This Agreement shall enter into force upon deposit of the fourth instrument of ratification, acceptance, approval or accession with the Depositary.

2. After the date referred to in paragraph 1, with respect to each state or regional economic integration organization that meets the requirements of Article XXIV, the Agreement will enter into force for said

state upon deposit of its instrument of ratification, acceptance, approval or accession.

Article XXVIII Reservations

No reservations may be made to this Agreement.

Article XXIX Provisional Application

1. This Agreement shall be applied provisionally by a State or regional economic integration organization which consents to its provisional application by so notifying the Depositary in writing. Such provisional application shall become effective from the date of receipt of the notification.

2. Provisional application by a State or regional economic integration organization shall terminate upon the entry into force of this Agreement for that State or regional economic integration organization or upon notification by that State or regional economic integration organization to the Depositary in writing of its intention to terminate provisional application.

Article XXX Amendments

1. Any Party may propose an amendment to this Agreement by providing to the Depositary the text of a proposed amendment at least sixty days in advance of a Meeting of the Parties. The Depositary shall provide a copy of this text to all other Parties.

2. Amendments to this Agreement that are adopted by consensus at a Meeting of the Parties shall enter into force on the date on which all Parties have deposited instruments of ratification, acceptance or approval with the Depositary.

3. Unless the Parties decide otherwise, the Annexes to this Agreement may be amended, by consensus, at any Meeting of the Parties. Unless otherwise agreed, amendments to an Annex shall enter into force for all Parties upon adoption.

Article XXXI Withdrawal

Any Party may withdraw at any time after twelve months from the date on which this Agreement entered into force with respect to that Party by giving written notice of withdrawal to the Depositary. The Depositary shall inform the other Parties of the withdrawal within 30 days of receipt of such notice. The withdrawal shall become effective six months after receipt of such notice.

Article XXXII Depositary

The original texts of this Agreement shall be deposited with the Government of the United States of America, which shall send certified copies thereof to the Signatories and the Parties thereto, and to the Secretary General of the United Nations for registration and publication, pursuant to Article 102 of the Charter of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, having been duly authorized by their respective Governments, have signed this Agreement.

DONE AT Washington, on this fifteenth day of May, 1998, in English and Spanish, both texts being equally authentic.

Annex I

Agreement Area

The Agreement Area comprises the area of the Pacific Ocean bounded by the coastline of North, Central, and South America and by the following lines:

a. The 40°N parallel from the coast of North America to its intersection with the 150°W meridian;

b. The 150°W meridian to its intersection with the 40°S parallel;

c. And the 40°S parallel to its intersection with the coast of South America.

Annex II

On-Board Observer Program

1. The Parties shall maintain an On-Board Observer Program in accordance with the provisions of this Annex. As a component of this Program, each Party may also maintain its own national observer program, in accordance with the provisions of this Annex.

2. Each Party shall require its vessels with a carrying capacity greater than 363 metric tons (400 short tons) and that operate in the Agreement Area, to carry an observer during each fishing trip in the Agreement Area. At least 50 percent of the observers on the vessels of each Party shall be IATTC observers; the remainder may be from the Party's national observer program, based on criteria set forth in this Annex as well as any other criteria established by the Meeting of the Parties.

3. All observers must:

a. have completed the technical training required by the guidelines that the Parties establish;

b. be a national of one of the Parties or a member of the scientific staff of the IATTC;

c. be capable of performing the duties set forth in paragraph 4 of this Annex; and

d. be included in a list of observers maintained by the IATTC or, if part of a national observer program, by the Party maintaining such program.

4. The duties of the observers shall be, *inter alia*:

a. to gather all pertinent information on the fishing operations of the vessel to which the observer is assigned as is necessary for implementation of this Agreement;

b. to make available to the captain of the vessel to which the observer is assigned all measures established by the Parties pursuant to this Agreement;

c. to make available to the captain of the vessel to which the observer is assigned the record of dolphin mortality of that vessel;

d. to prepare reports on information gathered in accordance with this paragraph, and provide the vessel captain with the opportunity to include in such reports any information the captain might deem to be relevant;

e. to provide such reports to the Director or the pertinent national program, to be used in

accordance with Annex VII, paragraph 1, of this Agreement; and

f. to perform such other functions as agreed by the Parties.

5. The observers shall:

a. except to the extent required under paragraphs 4(d) and 4(e) of this Annex, treat as confidential all information with respect to the fishing operations of the vessels and of the vessel owners, and accept this requirement in writing as a condition of appointment as an observer;

b. comply with requirements established in the laws and regulations of the Party which exercises jurisdiction over the vessel to which the observer is assigned, insofar as such requirements are not incompatible with the provisions of this Annex;

c. refrain from issuing or endorsing any certificate or other documentation relating to the fishing operations of the vessel, except as may be approved by the Parties; and

d. respect the hierarchy and general rules of behavior which apply to all vessel personnel, provided such rules do not interfere with the duties of the observers described in this Annex and with the obligations of vessel personnel set forth in paragraph 6 of this Annex.

6. The responsibilities of the Parties and vessel captains regarding observers shall include the following, *inter alia*:

a. Observers shall be allowed access to vessel personnel and to the gear and equipment specified in Annex VIII;

b. Upon request, observers shall also be allowed access to the following equipment, if present on the vessel to which they are assigned, in order to facilitate the carrying out of their duties set forth in paragraph 4:

   i. satellite navigation equipment;

   ii. radar display viewing screens when in use;

   iii. high-powered binoculars including during the chase and encirclement of dolphins to facilitate identification, except when in use by vessel personnel; and

   iv. electronic means of communication;

c. Observers shall have access to the vessel working deck during net and fish retrieval and to any specimen, alive or dead, that is brought aboard the vessel during a set in order to collect biological samples in accordance with the On-Board Observer Program or as otherwise required by competent national authorities as part of a national observer program;

d. Observers shall be provided accommodations, including lodging, food, and adequate sanitary facilities equal to those of the crew;

e. Observers shall be provided with adequate space on the bridge or pilothouse for clerical

work, as well as space on deck adequate for carrying out observer duties; and

f. The Parties shall ensure that captains, crew, and vessel owners do not obstruct, intimidate, interfere with, influence, bribe, or attempt to bribe an observer in the performance of his or her duties.

7. The Parties shall:

   a. ensure that any observers from their respective national programs collect information in the same manner as is required for IATTC observers; and

   b. provide to the Director copies of all raw data collected by observers from their respective national programs in a timely manner upon the conclusion of the trip during which the data were collected, along with summaries and reports comparable to those provided by IATTC observers

8. In a timely manner after each trip observed by an IATTC observer, the Director, in a manner consistent with any applicable confidentiality requirements, is requested to provide to the Party under whose jurisdiction the vessel fished, copies of all raw data, summaries, and reports pertaining to the trip.

9. Notwithstanding other provisions of this Annex, if the Director determines that the placement of an observer from the On-Board Observer Program is not practical, a vessel subject to the jurisdiction of a Party that fishes in the Agreement Area without setting on dolphins may use a trained observer from another international program, provided such program is approved by the Parties, to collect

pertinent information for the On-Board Observer Program, and to confirm to the Director that such vessel does not set on dolphins.

10. Observers from the On-Board Observer Program may be assigned to vessels of non-Parties at the discretion of the Director, provided the vessel and the vessel captain comply with all the requirements of this Annex, and all other applicable requirements of this Agreement. The Director is requested to inform the Parties of any such assignment in a timely manner.

11. Fees

    a. The Parties shall establish the amount of the annual vessel fees to cover the costs of the On-Board Observer Program. The fees shall be calculated on the basis of the carrying capacity of each vessel or any other standard specified by the Parties.

    b. At the time a Party submits to the Director the list of vessels under Annex IV to this Agreement, it shall also submit payment, in U.S. dollars, for the fees established under paragraph 11(a) of this Annex, specifying which vessels the payment covers.

    c. No observer shall be assigned to a vessel for which the fees, as required under paragraph 11(b) of this Annex, have not been paid.

Annex III

Per-Stock, Per-Year Dolphin Mortality Caps

1. The Parties shall establish, at a meeting convened pursuant to Article VIII of this Agreement, a per-stock, per-year dolphin mortality cap for each stock of dolphins, determined by the Meeting of the Parties, based on the best available scientific evidence, of between 0.2 percent and 0.1 percent of the Minimum Estimated Abundance (N_{min}) as calculated by the U.S. National Marine Fisheries Service or equivalent calculation standard as might be developed or recommended by the Scientific Advisory Board but in no event shall the total annual incidental dolphin mortality exceed 5,000, consistent with the provisions of this Agreement. In the year 2001 and thereafter, the per-stock, per-year cap shall be 0.1 percent of N_{min}.

2. The Parties shall conduct in 1998, or as soon as possible thereafter, a scientific review and assessment of progress toward the year 2001 objective, and consider recommendations as appropriate. Up to the year 2001, in the event that annual mortality of 0.2 percent of N_{min} is exceeded for any stock of dolphins, all sets on that stock and on any mixed schools containing members of that stock shall cease for that year. Beginning in the year 2001, in the event that annual mortality of 0.1 percent of N_{min} is exceeded for any stock of dolphins, all sets on that stock and on any mixed schools containing members of that stock shall cease for that year. In the event that annual mortality of 0.1 percent of N_{min} is exceeded for either eastern spinner or northeastern spotted dolphin stocks, the Parties shall conduct a

scientific review and assessment and consider further recommendations.

3. For purposes of this Agreement, the Parties shall use the current estimate of absolute abundance for the dolphin stocks of the eastern Pacific Ocean presented by Wade and Gerrodette to the International Whaling Commission in 1992, based on U.S. National Marine Fisheries Service research vessel data for the period 1986-1990, until the Parties agree on an updated set of figures. Such updates could result from the analysis of data from future research cruises and indices of abundance and other relevant scientific data from the Parties, the IATTC and other scientific organizations.

4. The Parties shall establish a system, based on real-time observer reporting, to ensure effective implementation and compliance with the per-stock, per-year dolphin mortality cap.

5. Within six months of the entry into force of this Agreement, the Parties shall establish a system for the allocation of the per-stock per-year dolphin mortality cap for each stock for the ensuing year and years thereafter. This system shall provide for the distribution of the mortality limits in Paragraph 1 of this Annex among vessels of the Parties which are eligible for Dolphin Mortality Limits, in accordance with Annex IV. When establishing this system, the Parties shall consider the best available scientific evidence on the distribution and abundance of the stocks in question, and other variables which the Meeting of the Parties shall define at a later date.

Annex IV

Dolphin Mortality Limits (DMLs)

I. Assignment of DMLs

1. Each Party shall provide to the Meeting of the Parties, through the Director, prior to October 1 of each year, a list of vessels under its jurisdiction of carrying capacity greater than 363 metric tons (400 short tons) that have requested a full-year DML for the following year, indicating those other vessels that are likely to be operating in the Agreement Area in the following year, and vessels that have requested a second-semester DML for the following year.

2. The IRP shall, by November 1 of each year, or later if agreed by the IRP, provide to the Meeting of the Parties a list of qualified applicant vessels eligible to receive a DML. For purposes of this Agreement, a vessel shall be considered qualified if:

    a. it has been certified by the relevant national authorities to be in possession of all of the dolphin safety gear and equipment required in Annex VIII;

    b. its captain and crew have received approved training in dolphin release and rescue techniques comparable to a standard established by the Meeting of the Parties;

    c. it is over 363 metric tons (400 short tons) carrying capacity in size;

    d. it has a captain considered qualified due to his or her prior record of performance; and

e. the vessel is not deemed to be disqualified under Section II of this Annex.

3. A vessel shall not be considered qualified under paragraph 2 if, on the date of the request pursuant to paragraph 1 of this Annex, the vessel is operating under the jurisdiction of a Party whose applicable laws and regulations prohibit vessels under its jurisdiction from fishing for tuna in association with dolphins; nor shall DMLs be assigned to any Party in order to provide permits for fishing in the Agreement Area to vessels flying the flag of another State whose applicable laws and regulations prohibit vessels under its jurisdiction from fishing for tuna in association with dolphins.

4. 98 percent, or such other unreserved portion as the Parties might determine, of the overall dolphin mortality limit for the fishery (5,000, or such other lower limit as the Parties might determine) shall be used to calculate into an average individual vessel DML (ADML) and distributed among the Parties for the succeeding year, as set forth in paragraph 5 of this Section.

5. The ADML shall be calculated by dividing the unreserved portion of the overall DML for the fishery established under paragraph 4 by the total number of qualified vessels requesting full-year DMLs. The distribution of DMLs among Parties shall be determined by multiplying the ADML by the number of qualified vessels requesting full-year DMLs and operating under the jurisdiction of each Party.

6. The remaining two percent, or such other portion as the Parties might determine, of the overall DML for the fishery shall be maintained as a separate Reserve

DML Allocation (RDA), to be managed at the discretion of the Director. Any Party may request that the Director assign DMLs from such RDA to vessels fishing under its jurisdiction which do not normally fish for tuna in the Agreement Area but which may, from time to time, desire to participate in the fishery in the Agreement Area on a limited basis, provided that such vessels and their captains and crews meet the operational and training requirements set forth in Annex VIII of this Agreement and that the requirements set forth in paragraphs 2 and 3, of this Section are met. Any accidental mortalities caused by vessels operating in the Agreement Area under the jurisdiction of any of the Parties that have not requested DMLs for their fleet shall also be deducted from this RDA.

7. No DML shall be assigned to a vessel which has been determined by the Parties to have engaged in a pattern of violations, as confirmed through enforcement actions taken against such vessel by the Party under whose jurisdiction it operates, which diminish the effectiveness of the International Dolphin Conservation Program.

8. The individual Parties with qualified vessels that will be fishing for tuna in association with dolphins shall manage their DMLs in a responsible manner, provided that no individual vessel shall receive a total annual DML in excess of the DML established for 1997 by the IRP, and reported in the Minutes of the 14th Meeting of the IRP, held on February 19-20, 1997, under the La Jolla Agreement. No Party shall allocate to the total of its qualified vessels a greater number of DMLs than those that such Party has been allocated under Sections I and III of this Annex. No

initial assignment of DMLs may result in any vessel receiving a DML in excess of the ADML unless its performance in reducing dolphin mortalities, as measured by the IRP based upon the previous two years' data, is better than the average performance of the international fleet as a whole. No initial assignment of DMLs may result in any vessel receiving a DML in excess of the ADML if, during the previous year, it has committed any of the infractions identified in Section III, paragraph 4 of this Annex, subject to the conditions established pursuant to that paragraph.

9. Should the total mortalities of the fleet of any Party meet or exceed the total amount of DML distributed to it pursuant to this Annex, fishing for tuna in association with dolphins shall cease for all vessels operating under the jurisdiction of that Party.

10. Each Party shall, no later than February 1 of each year, notify the Director of the initial allocation of its distributed DML among its fleet. No vessel may begin fishing for tunas associated with dolphins until the Director receives such notification.

II. Utilization of DMLs

1. Any vessel which is assigned a full-year DML and does not set on dolphins prior to April 1 of that year, or which is assigned a second-semester DML and does not set on dolphins by December 31 of that year, or which is assigned a per-trip DML from the RDA and does not set on dolphins during that trip, unless as a result of *force majeure* or extraordinary circumstances, as agreed by the IRP, shall lose its DML and may not set on dolphins for the remainder of that year. Any such vessel that loses its DML on

two consecutive occasions shall not be eligible to receive a DML for the following year.

2. Within six months following entry into force of this Agreement, the IRP, in cooperation with the scientific staff of the IATTC, shall develop and recommend a system by which to measure DML utilization in order to deter frivolous requests for DMLs. Such recommended system shall be presented for consideration by the Meeting of the Parties.

III. Use of forfeited or unutilized DMLs

1. After April 1 of each year, any DMLs which the Director determines will not be utilized pursuant to Section II or which have otherwise been forfeited shall be reallocated to the Parties consistent with this Section.

On the first working day in April of each year, the full-year DMLs assigned to those vessels that have not utilized them, pursuant to Section II, or have otherwise forfeited them, shall be redistributed among the Parties by the Director, consistent with the formula established pursuant to Section I, paragraph 5, but after first adjusting such formula as set forth in subparagraphs (a), (b) and (c) below. Such additional DMLs may be reallocated by the individual Parties among qualified vessels under the jurisdiction of such Party, subject to limitations and conditions set forth in paragraphs 3, 4, 5, 6 and 7 of this Section.

a. In performing the reallocation, any vessels that may have lost or otherwise forfeited DMLs under this paragraph, and any vessels requesting second-semester DMLs after the deadline set forth in Section I, paragraph 1, shall not be considered.

b. Prior to establishing the number of DMLs available for reallocation under this Section, adjustment shall be made by subtracting from such number any observed dolphin mortalities caused by those vessels that lost their DMLs under Section II, paragraph 1.

c. Prior to establishing the number of DMLs available for reallocation under this Section, the Director shall deduct one third of the ADML calculated pursuant to Section I, paragraph 5, for allocation to each vessel requesting a second-semester DML prior to the deadline established pursuant to Section I, paragraph 1. Such second-semester DMLs shall be allocated by the Director to the Parties proportionately, based upon the jurisdiction of respective Parties over vessels covered under this subparagraph. The second-semester DMLs assigned to such vessels by the Parties under whose jurisdiction they operate shall not exceed one-third of the ADML calculated pursuant to Section I, paragraph 5. Such vessels may not begin setting on dolphins before July 1 of that year.

3. Any Party may adjust the DMLs of its qualified vessels which meet the criteria set forth in Section I, paragraph 2, of this Annex either upward or downward, provided that no vessel is assigned an adjusted DML in excess of 50 percent above its initial DML, unless its performance in successfully reducing dolphin mortalities, as measured by the IRP, is in the upper 60 percent of the performance of the international fleet as a whole, as determined by the IRP, based upon the prior year's data. A Party

making such an adjustment shall so notify the Director no later than May 1, and no such adjustment shall take effect until the Director has been notified.

No vessel may have its initial DML adjusted upward by any Party if the IRP had determined, and the Party with jurisdiction over the vessel concurs, that during that year or the previous year:

a. the vessel fished without an observer;

b. the vessel set on dolphins without a DML;

c. the vessel set on dolphins after reaching its DML;

d. the vessel knowingly set on a banned dolphin stock;

e. the captain, crew, or the vessel owner committed any of the actions described in Annex II, Paragraph 6(f) of this Agreement;

f. the vessel made a sanctionable night set; or

g. the vessel used explosives during any phase of a fishing operation involving dolphins.

For infractions described in (a), (b), (c), (d), (f), and (g), a Party will be deemed to have provided such concurrence if it does not object to the IRP within six months of a referral of a possible violation from the IRP. For the infraction described in (e), a Party will be deemed to have provided such concurrence if it does not object to the IRP within 12 months of such referral.

5. No vessel may be eligible to receive an additional allocation of DML by a Party unless it has on board all of the required dolphin safety gear and equipment

throughout the year; and no such upward allocation may be made for a vessel which has exceeded its initial DML prior to April 1, unless due to force majeure or extraordinary circumstances, as agreed by the Meeting of the Parties, in consultation with the IRP.

6. For any vessel exceeding its DML, as it may be adjusted pursuant to this Annex, during a given year, the amount of such excess, plus an additional 50 percent of that amount, unless the IRP recommends otherwise, shall be deducted from DMLs assigned to that vessel by a Party under whose jurisdiction the vessel operates over subsequent years in a manner prescribed by the IRP.

7. If at any time a vessel meets or exceeds its DML, as it may be adjusted pursuant to this Annex, that vessel shall immediately cease all fishing for tuna in association with dolphins.

IV. Implementation

1. The Parties shall ensure that in the implementation of the DML system established by this Annex, the per-stock, per-year dolphin mortality caps, as specified in Annex III, are not exceeded.

2. In cases involving unusual or extraordinary circumstances not foreseen in this Annex, the Parties, as recommended by the IRP, may take such measures as are necessary, consistent with the provisions of this Annex, in order to implement the DML system.

3. If the mortality in any given year increases above levels which the IRP considers to be significant, the IRP shall recommend that the Parties hold a meeting

to review and identify the causes of mortality and formulate options to address such causes.

Annex V

Scientific Advisory Board

1. The Parties shall maintain the Scientific Advisory Board of technical specialists established pursuant to the La Jolla Agreement to assist the Director in matters regarding research to

    a. modify current purse-seine technology to make it less likely to cause dolphin mortality and

    b. seek alternative means of capturing large yellowfin tuna.

2. The functions and responsibilities of the Board shall be to:

    a. Meet at least once each year;

    b. Review plans, proposals, and research programs of the IATTC to seek to meet the objectives set forth in paragraph 1 above;

    c. Provide advice to the Director concerning the design, facilitation, and guidance of research to achieve the objectives set forth in paragraph 1 above; and

    d. Assist the Director in locating sources of funding to conduct such research.

3. The Board will consist of no more than 10 members, no more than two of whom shall be from any one

country, selected from the international community of scientists, fishing gear experts, the fishing industry, and environmentalists. The members will be proposed by the Director on the basis of their technical expertise, and each one will be subject to approval by the Parties.

Annex VI

National Scientific Advisory Committees

1. The functions of the National Scientific Advisory Committees (NATSACs), established in accordance with Article XI of this Agreement, shall be, inter alia, to:

    a. Receive and review relevant data, including data provided to national authorities by the Director;

    b. Advise and recommend to their governments measures and actions that should be undertaken to conserve and manage stocks of living marine resources in the Agreement Area;

    c. Make recommendations to their governments regarding research needs, including research concerning ecosystems, the effects of climatic, environmental and socioeconomic factors, the effects of fishing as well as on measures contemplated in this Agreement, fishing techniques and practices, and gear technology research, including the development and use of selective environmentally safe and cost-effective

fishing gear; and the coordination and facilitation of such research;

d. Conduct scientific reviews and assessments by the year 1998 or as soon as possible thereafter, regarding progress toward the year 2001 objective of achieving a per-stock, per-year cap of 0.1 percent N_{min}, and make appropriate recommendations to their governments concerning these reviews and assessments, as well as additional assessments in the year 2001 consistent with this Agreement;

e. Ensure the regular and timely full exchange of data among the Parties and the NATSACs on catch of tuna and associated species and bycatch, including dolphin mortality data, for the purposes of developing conservation and management recommendations to their governments as well as recommendations for enforcement and scientific research while not violating the confidentiality of business confidential data;

f. Consult with other experts as necessary for the purpose of gathering as much information as possible that might be useful for achieving the objectives of this Agreement; and

g. Perform such other functions as their respective governments might assign to them.

2. Reports of the NATSACs, including of their cooperative meetings, shall be made available to the Parties and the public, in a manner consistent with any applicable confidentiality requirements.

3. The Director may convene, in addition to the meetings pursuant to Article XI, paragraph 3, meetings with the purpose of facilitating consultation among the NATSACs.

4. The functions of the meetings of the NATSACs shall be to:

    a. Exchange information;

    b. Review IATTC research to achieve the objectives of this Agreement; and

    c. Make recommendations to the Director concerning the future research program to achieve the objectives of this Agreement.

5. The NATSAC members from any Party who attend the meeting shall be designated by that Party.

Annex VII

International Review Panel

1. In compliance with Article XII of this Agreement, the International Review Panel (IRP) shall have the following functions:

    a. Each year compile a list of the vessels that qualify for DMLs as agreed in Annex IV;

    b. Analyze the reports submitted to the IRP, regarding all tuna-fishing trips made by vessels covered by this Agreement;

    c. Identify possible infractions, based on the list of possible infractions approved by the Meeting of the Parties;

d. Inform each Party, through the Director, of possible infractions committed by vessels flying its flag or operating under its jurisdiction, and receive from that Party information on the actions taken;

e. Maintain an updated report on the actions taken by the Parties to provide adequate training for fishing captains, and maintain a list of those fishing captains determined to be complying with established performance requirements, based on the information provided by each of the Parties;

f. Recommend to the Meeting of the Parties pertinent measures for achieving the objectives of this Agreement, in particular those related to the use of gear, equipment and fishing techniques, considering improvements in technologies, as well as the adoption of appropriate incentives for captains and crews to meet the objectives of this Agreement;

g. Prepare and provide the Meeting of the Parties an annual report on those aspects of the operation of the fleet relating to the implementation of this Agreement, including a summary of possible infractions identified and the actions taken by the Parties;

h. Recommend to the Parties ways to progressively reduce dolphin mortality incidental at the fishery in the Agreement Area; and

i. Perform other functions as assigned by the Meeting of the Parties.

2. The IRP shall be made up of representatives of the Parties ("governmental members"), three representatives of non-governmental environmental organizations with recognized experience in matters pertaining to this Agreement and with offices in the territory of a Party, and three representatives from the tuna industry that operates under the jurisdiction of any of the Parties in the Agreement Area ("non-governmental members").

3. The non-governmental members shall have a two-year term of membership, starting at the first meeting of the IRP immediately after their election.

4. The non-governmental members will be elected in accordance with the following procedure:

   a. Prior to the expiration of the term of a non-governmental member, the relevant non-governmental organizations may present candidates' nominations 60 days before the expiration of the term to the Director. A curriculum vitae should accompany each nomination. The current non-governmental members may be nominated for additional periods.

   b. Once the nominations are received, the Director shall transmit them in writing to the Parties within 10 days. The Parties should send their votes to the Director within 20 days of the transmittal of the nominations by the Director. In this election, the three nominees from each non-governmental sector who receive the most votes shall be elected; the

nominee who receives the fourth largest number of votes shall be designated the alternate member. In the case of a tie, the Director should solicit a new vote from the Parties to determine the member and the alternate.

c. If a non-governmental position becomes permanently vacant, because of death, resignation, or failure to participate in three consecutive meetings of the IRP, the alternate shall fill the position for the remainder of that position's term. The candidate who received the fifth largest number of votes in the elections referred to in paragraphs (a) and (b) shall be designated the alternate member. If additional vacancies occur, the Director shall inform the relevant non-governmental organizations so that new candidates may be submitted for an election process consistent with that described in paragraphs (a) and (b).

d. Each alternate may attend the meetings of the IRP, but shall have no speaking rights if all the members of his/her respective sector are present.

5. The IRP shall hold at least three meetings a year, one of which will preferably be held on the occasion of the ordinary Meeting of the Parties.

6. The IRP may convene additional meetings at the request of at least two of the Parties, provided that a majority of the Parties support the request.

7. The IRP meetings shall be chaired by a Presider elected by the governmental members at the beginning of each meeting, who shall decide on

matters of order. Any member shall have the right to ask that any decision made by the Presider be decided as specified in Paragraph 9 of this Annex.

8. The meetings shall be in Spanish and English, and IRP documents shall also be produced in both languages.

9. The decisions at the meetings of the IRP shall be adopted by consensus among the governmental members.

10. The following criteria shall be applied to attendance at IRP meetings:

    a. There shall be no restrictions on the number of persons a Party can include in its delegation to an IRP meeting.

    b. Any IATTC member State or Signatory to this Agreement may be represented by an observer.

    c. Any State not a member of the IATTC and any State or regional economic integration organization not a signatory to this Agreement may be represented by an observer, with prior notification to IRP governmental members, unless any governmental member of the IRP objects in writing.

    d. The Director may invite representatives of intergovernmental organizations as observers, with prior notification to IRP members, unless any governmental member of the IRP objects in writing.

e. In any cases referred to in (c) and (d) above, the Director shall not disclose the identity of the objecting Party.

f. Each observer is limited to two delegates, but may bring more with the approval of two-thirds of the governmental members of the IRP.

11. In cases of urgency, and without prejudice to the provisions of paragraph 9 of this Annex, the IRP may take decisions by correspondence through a vote of the governmental members, under the following procedures:

a. The proposal shall be circulated to all members of the IRP, in writing, with all pertinent documentation, at least fourteen days before the proposed effective date of the resolution, action, or measure; the votes shall be transmitted to the Director no less than seven days before the proposed effective date;

b. The proposal shall be considered urgent unless a simple majority of the governmental members objects in writing; the proposal shall be accepted unless any governmental member objects in writing; and

c. The Director shall circulate the proposal as well as the accompanying documentation, receive and count the votes, and inform the IRP members of the results of a vote as soon as the voting closes.

12. The Director will carry out the functions of the Secretary, which shall include:

a. Assisting in the convening and organization of IRP meetings;

b. Presenting information required by the IRP for carrying out its functions and responsibilities, including observer IRP forms and field data forms providing information on the activities of the vessels, dolphin mortality, and the presence, condition, and use of the dolphin safety equipment and gear;

c. Preparing minutes of all meetings and draft special reports and documents dealing with the activities of the IRP;

d. Providing to each Party, for its consideration, recommendations and information concerning possible infractions identified by the IRP for vessels under its jurisdiction;

e. Distributing to the IRP information received from Parties on the actions taken on possible infractions identified by the IRP;

f. Publishing the Annual Report of the IRP and making it available to the public, in accordance with the instructions given by the Meeting of the Parties;

g. Presenting to the members of the IRP information received from the Parties referred to in Paragraph 1(e) of this Annex; and

h. Carrying out other tasks necessary for the accomplishment of the IRP's functions, as assigned by the Parties.

13. The rules of procedure of the IRP may be modified by the Meeting of the Parties. Modifications may be recommended by the IRP.

14. The members of the IRP and any other participants invited to attend IRP meetings as observers shall treat all the information presented at such meetings in accordance with the provisions of confidentiality set forth in Article XVIII of this Agreement.

Annex VIII

Operational Requirements For Vessels

1. For the purposes of this Annex:

   a. "Strip" means a section of net that is approximately 6 fathoms deep.

   b. "Backdown" means the procedure for releasing captured dolphins by shifting the vessel's engine(s) into reverse during net retrieval, causing the net remaining in the water to form a channel, and the corkline at the apex of the channel to submerge.

   c. "Bunch" means a length of corkline gathered together.

   d. "Sack-up" means that part of the fishing process when the catch is concentrated near the surface for loading aboard the vessel.

2. Dolphin Safety Gear and Equipment Requirements

A vessel with a carrying capacity of more than 363 metric tons (400 short tons) operating in the Agreement Area shall:

a. Have a purse seine equipped with a dolphin safety panel (DSP) with the following characteristics

   i. A minimum length of 180 fathoms (as measured before installation), except that the minimum length of the DSP in nets deeper than 18 strips must be determined in a ratio of 10 fathoms in length for each strip of net depth. The DSP must be installed so as to cover the backdown channel along the corkline, beginning at the outboard end of the last bow bunch pulled and continuing to at least two-thirds the distance from the apex of the backdown channel to the point where the net is secured at the stern. The DSP shall consist of small-mesh webbing not to exceed 1 ¼ inches (3.2 cm) stretched mesh, extending downward from the corkline to a minimum depth of two strips.

   ii. Each end shall be identified with a highly visible marker.

   iii. Any space between the corks or the corkline and the small mesh shall not exceed 1 3/8 inches (3.5 cm) in diameter.

b. Have at least three operable speedboats. All operable speedboats shall be equipped with towing bridles or posts, and tow lines;

c. Have an operable raft suitable for the observation and rescue of dolphins;

d. Have at least two operable facemasks suitable for underwater observation; and

e. Have an operable long-range floodlight with a minimum output of 140,000 lumens.

3. Dolphin Protection and Release Requirements and Prohibitions

A vessel with a carrying capacity of more than 363 metric tons (400 short tons) operating in the Agreement Area shall:

a. Perform backdown during every set in which dolphins are captured, until it is no longer possible to remove live dolphins from the net by this procedure. At least one crewman shall be deployed during backdown to aid in the release of dolphins;

b. Continue efforts to release any live dolphins remaining in the net after backdown, so that all live dolphins are released prior to the initiation of the sack-up procedure;

c. Not sack-up or brail live dolphins;

d. Avoid injuring or killing dolphins captured in the course of fishing operations;

e. Complete backdown no later than thirty minutes after sunset, as determined by an accurate and reliable source approved by the Parties. A set that does not meet this requirement is termed a "night set";

f. Not use any type of explosive during any phase of a fishing operation involving dolphins (underwater flares are not considered to be explosives);

g. Cease setting on dolphins when its DML has been reached;

h. Not intentionally set on dolphins if the vessel does not have a DML; and

i. Perform a periodic net alignment to ensure the proper location of the dolphin safety panel during the backdown procedure, based on criteria established by the IRP.

It is emphasized that the above requirements should not lead to crewmen being placed in situations that present unnecessary risks to their personal safety.

4. Exceptions

a. A vessel without a DML is exempt from the requirements of Paragraph 2 of this Annex and from the obligation of carrying out the backdown manoeuvre mentioned in Paragraph 3 of this Annex unless the Party with jurisdiction over that vessel determines otherwise.

b. Any such vessel that captures dolphins accidentally shall attempt to release the dolphins, using every means at its disposal, including aborting the set, and taking into consideration the requirements set forth in paragraph 3 of this Annex.

5. Treatment of Observers

Captains, crew, and other personnel shall comply with their responsibilities regarding the presence of observers aboard their vessels, as specified in Annex II, paragraph 6.

6. Vessels under 363 metric tons (400 short tons)

No vessel with a carrying capacity of 363 metric tons (400 short tons) or less may intentionally set on dolphins.

Annex IX

Elements of a Tuna Tracking and Verification Program

1. Pursuant to Article V, paragraph 1(f), the Parties shall establish a program to track and verify tuna harvested by vessels in the Agreement Area, based on the following elements:

a. the use of weight calculation for the purposes of tracking tuna caught, landed, processed and exported;

b. additional measures to enhance current observer coverage, including the establishment of criteria for training and for improving monitoring and reporting capabilities and procedures;

c. the designation of well location, procedures for sealing holds, procedures for monitoring and certifying both above and below deck, or through equally effective methods;

d. the reporting, receipt, and database storage of radio and facsimile transmittals from vessels containing information related to the tracking and verification of such tuna;

e. the shore-based verification and tracking of such tuna throughout the fishing, transshipment, and canning process by means of On-board Observer Program trip records ;

f. the use of periodic audits and spot checks for caught, landed, and processed tuna products; and

g. the provision of timely access to relevant data.

2. Each Party shall implement this program in its respective territory, on vessels subject to its jurisdiction and in marine areas with respect to which it exercises sovereignty or sovereign rights and jurisdiction.

Annex X

Guidelines and Criteria for the Participation of Observers at Meetings of the Parties

1. The Director shall invite to Meetings of the Parties convened pursuant to Article VIII intergovernmental organizations whose work is relevant to the implementation of this Agreement, as well as non-Parties whose participation may promote implementation of this Agreement.

2. Non-governmental organizations (NGOs) with recognized experience in matters pertaining to this Agreement shall be eligible to participate as observers in all Meetings of the Parties convened pursuant to Article VIII except meetings held in executive session or meetings of Heads of Delegation.

3. Any NGO desiring to participate as an observer in a Meeting of the Parties shall notify the Director of its desire to participate at least 50 days in advance of the Meeting. The Director shall notify the Parties of the names of such NGOs at least 45 days prior to the beginning of the Meeting.

4. If a Meeting of the Parties is held with less than 50 days notice, the Director shall have greater flexibility

concerning the timing of the sending of the invitations.

5. An NGO desiring to participate as an observer may do so unless a majority of the Parties formally objects for cause in writing at least 30 days prior to the beginning of the meeting in question.

6. Any participating observer may:

a. attend meetings, subject to paragraph 2 of this Annex, but not vote;

b. make oral statements during the meetings upon the invitation of the chairman;

c. distribute documents at the meeting, with the approval of the chairman; and

d. engage in other activities, as appropriate and as approved by the chairman.

7. The Director may require NGO observers to pay reasonable fees, and to cover costs attributable to their attendance (*e.g.* copying expenses).

8. All observers admitted to a Meeting of the Parties shall be sent or otherwise provided the same documentation generally available to Parties, except documentation containing business-confidential data.

9. All observers admitted to a Meeting of the Parties shall comply with all rules and procedures applicable to other participants in the meeting.

(212a)

APPENDIX J

INCIDENTAL MORTALITY OF DOLPHINS IN THE EASTERN TROPICAL PACIFIC TUNA FISHERY, 1979-1988

A DECADE OF THE INTER-AMERICAN TROPICAL TUNA COMMISSION'S SCIENTIFIC TECHINICIAN PROGRAM

Working Document 2
Tuna-Dolphin Workshop

San Jose, Costa Rica
14-16 March, 1989

Inter-American Tropical Tuna Commission
c/o Scripps Institution of Oceanography
La Jolla, California 92093, U.S.A.

1989

(Excerpt: p.15-16)

Time of capture (day vs. night sets)

We define night sets (sundown sets) as those in which the backdown procedure finishes in darkness. Because of the additional difficulties that darkness generates for the dolphin rescue effort, and perhaps also for the dolphins' perception of the situation, sundown sets have much higher mortality rates than day sets. The number of dolphins left in the net after the backdown maneuver is much higher in sundown sets than in day sets (8.6 vs. 3.9).

Table 4. Comparison of mortality in day sets & sundown sets

	# Sets	% Sets	% mortality	MPS	MPT
Day sets	14428	90.7	74.4	6.0	396
Sundown sets	1481	9.3	25.6	20.2	1274
All sets	15909			7.4	481

Duration of set

Longer sets have higher mortality values than shorter ones. The following table presents MPT and MPS values for one part of the set, the backdown maneuver, which on average lasts about 15 minutes.

Table 5. MPS and MPT for various backdown times

Backdown time (mins)	MPS	MPT
1-10	2.7	229
11-20	6.2	352
21-30	18.0	951
31-40	53.7	2786

Long backdowns are infrequent, and may be associated either with the capture of large herds of dolphins, or with a malfunction, so one cannot assume that the duration of the set is the sole cause of high mortality. However, it is obvious that the longer the dolphins stay inside the net, the more likely they are to become entangled or die trapped by a net collapse or canopy.

APPENDIX K

Dolphins and the Tuna Industry

Committee on Reducing Porpoise Mortality from Tuna Fishing

Board on Biology
Board on Environmental Studies and Toxicology
Commission on Life Sciences
National Research Council

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Executive Summary

1. INTRODUCTION

Approximately one quarter of the world's tuna catch is taken in the eastern tropical Pacific Ocean (ETP). In that area, the most economically important tuna species, the yellowfin *(Thunnus albacares)*, is often found in association with various species of dolphins. Increasingly since the late 1940s, tuna fishermen have taken advantage of this association and have caught tuna by setting their nets around the highly visible herds of dolphins, which, being mammals, must surface often to breathe. Despite improvements in techniques and in gear that have substantially reduced the

number of dolphins killed in the ETP tuna fishery, thousands of dolphins are still killed each year.

When the Congress reauthorized the Marine Mammal Protection Act of 1972 (MMPA) on November 23, 1988, it stipulated several amendments to the act. One of these amendments (Section 110(a)) focused on identifying appropriate research into promising new methods of locating and catching yellowfin tuna without the incidental capture of dolphins. It further directed the Secretary of Commerce to arrange for "an independent review of information pertaining to such potential alternative methods to be conducted by the National Academy of Sciences with individuals having scientific, technical or other expertise that may be relevant to the identification of promising alternative fishing techniques." The report from the National Academy of Sciences would then be submitted by the Secretary, together with a proposed plan of research, development, and implementation of alternative fishing techniques, to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives.

This report, by the National Research Council's Committee on Reducing Porpoise Mortality from Tuna Fishing, provides background information on catching yellowfin tuna and the incidental capture of dolphins in the ETP, recommendations from workshops focusing on improving current fishing techniques, and recommendations for research on alternative techniques.

THE PROBLEM

Catching tuna with purse seines is the most efficient method currently available. There are three major modes of purse-seine fishing. The first is school fishing, in which schools of tuna near the surface are found visually and the purse seine is set around the school. The second, called log

fishing, depends on the attractive power of floating objects for tuna. Purse seines are set around natural logs or fish-aggregating devices to catch the fish that are often associated with them. The third method-the main focus of this report-is "dolphin fishing." Yellowfin tuna and certain species of dolphins are often associated, especially in the ETP. Dolphins are easy to see from a boat because of their frequent surfacing. The purse seine is set around the dolphin herd, and because the tuna are closely associated with them, catching dolphins usually means catching tuna as well. Although a variety of techniques and equipment have been developed to release the dolphins safely, thousands are still killed each year by dolphin fishing.

Although all three methods of purse seining catch tuna, log and school fishing catch mostly small, sexually immature tuna. Dolphin fishing usually catches large fish that are often sexually mature and produces larger average catches than the other methods. Thus, redirecting the fishing away from tuna associated with dolphins would be less efficient and would have a negative effect on the yield of the fishery and perhaps on the conservation of tuna populations. Considering only the point of view of economics and harvesting tuna, large tuna should be sought; fishermen should fish on dolphins and be discouraged from fishing on logs or schools. However, dolphin fishing kills dolphins; to minimize the killing of dolphins, all fishing should be directed away from dolphins. This dichotomy is the basis of the tuna-dolphin problem.

Two operational factors are related to the total number of dolphins killed in purse seining for tuna. The first is the number of times purse seines are set around dolphins, and the second is the number of dolphins killed in each such set. The first factor is affected by market prices, the availability of tuna of different sizes, restrictions such as the policy of some processors not to buy tuna caught on trips that

have involved the intentional encirclement or death of dolphins (so-called "dolphin-safe" tuna), and the availability of alternative methods of catching tuna. The second factor depends on conditions such as the fishermen's motivation, skill, and experience; the condition of the vessel's equipment; weather conditions; and technological developments. Therefore, two general approaches are available to achieve the goal of reducing dolphin mortality-economic and technical-and each approach has several options.

The tuna-dolphin problem has several components. First, it is an international problem. Part of the difficulty is due to differing conservation ethics- U.S. laws and policies have the goal of preventing all dolphin mortality from tuna fishing, whereas the laws and policies of other nations are more often directed toward conserving dolphin populations, but not necessarily preventing all mortality. The international scope of the problem was illustrated by a 1991 ruling of a panel of judges that a U.S. embargo imposed in 1990 on Mexican tuna-applied in accordance with the MMPA-violates the provisions of the General Agreement on Tariffs and Trade.

Economic factors also are important. The U.S. tuna fleet in the ETP has become very small, probably because of a variety of economic factors, probably including the recent decision by major canneries to buy only "dolphin-safe" tuna. As a result, regulations on the U.S. fleet and adoption by the U.S. fleet of new gear and techniques might not be effective in further reducing dolphin mortality unless they are supported to some degree by other countries and thus affect the activities of non-U.S. boats as well as U.S. boats. The effects of decisions with respect to buying only certain kinds of tuna will depend on the U.S. share of the market and other factors. Indeed, if the recent rate of its decline continues, the U.S. fleet will soon cease to play a significant role in fishing for dolphin-associated tuna in the ETP.

The committee's analysis made it clear that no methods of catching tuna without killing dolphins-currently available or capable of rapid development-are as efficient as current methods of catching large yellowfin tuna in the ETP. Therefore, although it was not specifically in its charge, the committee focused on modifications of current methods, as well as identifying areas for research that might lead to new methods several years down the road. The committee made no attempt to evaluate the relative costs and benefits of such a research program.

THE CURRENT FISHERY

More than 70 nations participate in the world tuna fishery, but only 10 of those nations account for almost 85% of the catch. In 1989, Japan accounted for about 29% and the United States for 12%. About 36% of the total catch is consumed by Japan and about 31% by the United States. Over the years, the ETP has been one of the most productive tuna fishing areas in the world.

The ETP fishery was formerly dominated by the U.S. fleet. Since 1960, the fleets of nations other than the United States have increased and the U.S. fleet has decreased, especially in recent years. The proportion of the catch taken by U.S. vessels decreased from 90% in 1960 to 32% in 1988 to 11% in 1991, and that taken by Latin American countries bordering the Pacific Ocean increased from 10% to 47% in 1988 and 57% by the end of 1991.

Until about 1975, the U.S. market consumed about 80% of the catch of surface-caught tuna from the ETP. With the expansion of the non-U.S. fleets during the 1980s, the share of the catch absorbed by the U.S. market declined, falling to 45% in 1987. Most of the difference went to Latin America, Europe, and the Far East.

Of particular interest to the committee is the surface fishery (bait-pole and purse seine) for yellowfin tuna in the

ETP. Surface-caught yellowfin and skipjack tuna provide the raw material for the canned light-meat tuna product marketed primarily in the United States, Europe, and the Far East. Over the years, as new fishing areas have become viable, the ETP has contributed a smaller fraction of the world catch of yellowfin and skipjack.

DOLPHIN MORTALITY ASSOCIATED WITH THE TUNA FISHERY

Although no accurate data on dolphin mortality are available for the early years (1950-1972), the increased offshore operation of increasingly sophisticated fishing vessels setting their nets on herds of dolphins clearly led to very high mortality, especially in the ETP. Even though published estimates of dolphin mortality from 1960 to 1972 are based on a small and probably biased data set, and although such estimates have varied among authors and from year to year, it seems likely that more than 100,000 dolphins were killed annually by the U.S. fleet. After 1972, the annual number killed by the U.S. fleet declined to approximately 20,000 in 1979 and an estimated 19,712 in 1988 and 12,643 in 1989. This decline was due to a decrease in the rate at which tuna boats killed dolphins and a decrease in the number of boats in the U.S. fleet. Mortality is much larger among the tuna fleets registered in increasing numbers in other countries. By 1986, only 34 boats of the 103-boat fleet were registered in the United States and subject to National Marine Fisheries Service (NMFS) regulations; by 1991, only 11 U.S. boats fished the ETP. The Inter-American Tropical Tuna Commission (IATTC) estimates that the total kill for 1989 was 97,000-102,000 dolphins, of which the kill of 12,643 attributed to the U.S. fleet was less than 15%. In 1990, total mortality declined to 52,000-56,000 dolphins, of which less than 10% (5,083 dolphins) was attributed to the U.S. fleet. In 1991, average mortality per set has continued to

decline and is now close to half of the 1990 values. Fishing effort on dolphins has also declined, and the total mortality for 1991 may be around 25,000 dolphins.

Three species of dolphins are most commonly affected: the spotted dolphin *(Stenella attenuata)*, the spinner dolphin *(Stenella longirostris)*, and the common dolphin *(Delphinus delphis)*. NMFS, which has responsibility for protecting marine mammals under the MMPA, set an annual quota in 1980 of 20,500 dolphins that could be killed by U.S. tuna boats, that quota including subquotas for various species and stocks. Additional regulations apply to fishing techniques.

Improvements in fishing gear and techniques discussed in Chapter 7, the mandatory observer program, and the kill quota were responsible for the dramatic decline in the number of dolphins killed by boats in the U.S. fleet. Currently, only about 0.5% of dolphins encircled by purse seines are injured or killed, and almost all of these are killed in a small number of problem sets. Most sets on dolphins are now zero-kill sets.

Most major modifications of gear and techniques were implemented more than a decade ago. More recent declines in mortality can be traced to improvements in equipment and the performance of the fishermen. Industrial groups have set up national technical advisory offices that, in collaboration with the IATTC, include organizing training courses for vessel captains and crews, inspecting the condition and performance of dolphin-saving gear, and diagnosing individual vessel or skipper problems. The recent declines in mortality, from 130,000 dolphins in 1986 to perhaps 25,000 in 1991, were achieved without any major technological advances or additions to the fishing gear.

Although mortality of dolphins has been drastically reduced, the annual kill is still substantial. In addition to the humanitarian and ecological concern for dolphins, the killing

of dolphins is detrimental to fishermen. Dolphins are viewed as a valuable resource to fishermen because they attract and hold large yellowfin tuna near the surface where they can be caught. Thus, reducing dolphin mortality as much as possible is in the interest of the fishermen.

U.S. TUNA AND MARINE MAMMAL POLICY AND ECONOMICS

The U.S. government has been involved in some form of tuna-policy negotiations since the 1940s and in formal regulatory activity concerning tuna fisheries since the 1960s. The relevant laws and activities include the founding of IATTC in 1949 and the Tuna Conventions Act of 1950, the Fishermen's Protective Act (1954), the International Commission on the Conservation of Atlantic Tunas and the Atlantic Tuna Conventions Act (1975), the U.S.-Canada Pacific Albacore Treaty (1982), and the South Pacific Tuna Act (1988). IATTC and the Tuna Conventions Act of 1950 and the Fishery Conservation and Management Act of 1976 have had the greatest impact on the tuna industry.

In addition to the general U.S. tuna-policy framework, the U.S. policies on marine mammal conservation and protection have significantly affected the U.S. high-seas tuna fleet. The most significant of these policies result from the MMPA (Chapter 2). The act prohibits the taking of any marine mammal. It (Section 1371) was amended in 1981 to state that " . . . [the] goal [of zero mortality] shall be satisfied in the case of the incidental taking of marine mammals in the course of purse-seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable."

The tuna fishery is part of a highly capitalized and international food-processing industry. This situation, combined with the migratory nature of tuna, results in

complex policy and management conditions that are critical to any effort to preserve and conserve dolphin populations.

The U.S. tuna market is 31% of the global tuna market, and an estimated 70% of the U.S. tuna supply is imported in either raw/frozen or canned form. U.S. tuna harvesters and processors have been moving away from the United States, leaving it more dependent on tuna imports. This trend will probably accelerate if any new costs are imposed on U.S. tuna harvesters or processors that are not incurred equally by foreign tuna companies. To the extent that attempts by the United States to reduce dolphin mortality increase costs or reduce productivity for U.S. vessels, these vessels will lose competitive ability in the ETP tuna fishery and are likely to be sold to foreign investors to remain competitive. Whether the U.S. government can (1) prevent the loss of U.S. vessels, (2) require U.S. tuna fishermen to operate at a competitive disadvantage, (3) subsidize fishermen to remain under U.S. jurisdiction, or (4) remove the advantage of foreign vessels by restricting access to the U.S. market remains unclear. Developing engineering-based solutions to the tuna-dolphin problem should be viewed as only the first step in reducing dolphin mortality. Unless the solution is cost-effective, U.S. and foreign tuna harvesters are unlikely to employ new dolphin-saving equipment or procedures or to avoid dolphin-associated fishing altogether.

FISHING GEAR

The process of purse seining any species of fish involves the encircling of the school with a long net to form a circular wall of netting. The net must be deep enough to discourage escape underneath it, and the encircling must be done rapidly enough to prevent escape before the ends are closed. The tuna purse seine, described in detail in Chapter 3, is rectangular, typically much longer than it is deep. A seine is approximately 1 mile long and 600 feet deep.

Once the school is located, a skiff is released from the stern of the vessel, with one end of the net (known as the ortza) attached. The skiff anchors this end of the net while the seiner encircles the targeted school and rejoins the skiff. The ortza is transferred to the vessel and made fast, thus closing the circle. At this point the net forms a vertical cylinder around the school of fish. To allow closure of the bottom of the seine, a series of rings are attached to the leadline through which a purse line is run. During the pursing operation, this purse line is pulled in from both ends, choking off the bottom of the seine. When the seine is completely pursed and the rings are alongside the vessel, the process of hauling in, or "drying up," the net can begin.

The remainder of the normal purse-seining operation involves "sacking up" the catch. This consists of reducing the volume of water inside the net until it is possible to bring the catch aboard using a large dip net called a "brailer." This is done through a process of bringing most of the net aboard, leaving only a small sack of reinforced netting in the water to confine the catch for brailing. Once the fish are removed, the remainder of the seine is brought aboard and made ready for the next set.

In fishing for tuna associated with dolphins, a variety of techniques and modifications of the seine are used to minimize the number of dolphins killed (see Chapter 3and Chapter 7).

BEHAVIOR OF TUNA AND DOLPHINS IN THE ETP

Several species of dolphins are found in association with tuna. The spotted dolphin *(Stenella attenuata)* is by far the most important from the point of view of its frequency of association with tuna and its use by fishermen for catching tuna. Three stocks of this species are in the ETP. The frequent appearance of spinner dolphins *(Stenella longirostris)* in sets makes that species significant as well,

although in almost all cases it appears in mixed herds with the spotted dolphin. The common dolphin *(Delphinus delphis)* is another important species, although sets on that species are less frequent than on the other two. A few other species found in association with tuna, but much less frequently, are the striped dolphin *(Stenella coeruleoalba)*, the roughtoothed dolphin *(Steno bredanensis)*, the bottlenose dolphin (*Tursiops truncatus)*, and Fraser's dolphin *(Lagenodelphis hosei)*.

The bond linking tuna and spotted dolphins is remarkably strong. It may persist through much or all of the seining operation. During seining, tuna and dolphins continue to associate so tightly that to catch dolphins also means to catch tuna.

FACTORS AFFECTING DOLPHIN MORTALITY

Many factors other than the total fishing effort on dolphins influence dolphin mortality. Some of the most important are the number of tuna caught, vessel captain, species or stock caught, area, flag of vessel, time of capture (day or night), duration of set, presence or absence of strong currents, occurrence of malfunctions, alignment of fine-mesh panel, and use of dolphin-saving procedures.

Many of these factors are interrelated. For instance, the larger the catch of tuna in a set, the longer the set will last, the larger the number of dolphins that will be caught, and the more likely it is that the set will finish after dark (dolphin mortality increases markedly after dark) or that a malfunction will occur. Also, different species or stocks of dolphins have different herd sizes and behaviors and inhabit different areas. Some areas and some species or stocks are fished during only part of the year, so spatial, temporal, and species effects cannot be discriminated. This makes it difficult to identify precisely the cause-effect mechanisms that result in the higher or lower mortalities.

Finally, the skill of the captain has a large effect. Even the best captains occasionally experience a set with high mortality, but in the long run they kill many fewer dolphins than captains of less experience and skill.

ESTIMATES OF DOLPHIN ABUNDANCE

Estimates of dolphin abundance in the ETP have been made by NMFS and IATTC on the basis of observations made from either research vessels or fishing boats. Other methods of estimating abundance, such as mark-recapture experiments, or other sources of data (e.g., sightings from aerial surveys) have proved inadequate for this purpose.

The best available estimate of the average total population of common, spinner, striped, and offshore spotted dolphins in the ETP in 1986-1990 is slightly over 8,000,000. Estimates of absolute abundance are important for seeing the impact of mortality within a stock due to fishing as a proportion of the total population, not as a number without any frame of reference.

The NMFS and IATTC studies demonstrate that none of the indicators of stock size shows any statistically significant trend in the last 5 years. Before 1982, and especially in the late 1970s, several stocks experienced large declines; however, since 1983 all stocks have been stable, and some appear to be increasing. However, the committee notes that better knowledge of recruitment rates and migration patterns of dolphins and better stock identification of individuals are needed for accurate descriptions of population trends.

TECHNIQUES FOR REDUCING DOLPHIN MORTALITY

After extensive analysis, the committee was unable to identify any currently available alternative to setting nets on

dolphins that is as efficient as dolphin seining for catching large yellowfin tuna. The committee also could not identify experimental modifications to gear or techniques of catching dolphin-associated tuna that would reduce dolphin mortality to or near to zero and would be practical in the fishery in the immediate future. Therefore, the committee concentrated on incremental improvements and longer-term research and regulatory options (Chapter 7).

Several small modifications to the current methods of tuna purse seining (e.g., the Medina double corkline, jet boats, and the Doppler current profiler) have immediate potential for reducing dolphin mortality. Each of these changes could have an incremental effect. The cumulative effect of these and other innovations could reduce significantly the impact of purse seines on dolphins.

The use of more sweeping changes in purse-seine gear and methods was given major attention by the committee. Modifications to reduce two fundamental problems-canopies and roll-ups-are described in Chapter 7.

The committee believes that the most promising major alterations in purse-seine gear are the following:

Modifications in netting material.

Modifications in hang-in ratio.

Modifications to the purse cable.

Development of lifting surfaces in critical parts of the net.

Several other concepts explored by the committee also show promise for reducing dolphin mortality. These modifications include inserting barriers between tuna and dolphins, improving the escape of dolphins from the backdown channel, separating the tuna from the dolphins once in the net, releasing dolphins without the backdown procedure, releasing dolphins before backdown, and breaking the tuna-

dolphin bond before setting the net.

The committee also explored alternative methods of locating and catching yellowfin tuna when they are not associated with dolphins. These include acoustical methods and fish-aggregating devices.

A variety of techniques are used worldwide to exploit tuna and other midwater schooling fish, but their production rates are much lower than those for the modern purse seiner; therefore, they are not as effective as fishing on dolphins in the ETP for a fishery supplying fish to canneries. Government and industry workshops have explored these alternatives. Methods considered by the committee include live-bait pole-and-line fishing, longlining, midwater trawling, pair trawling, and gillnetting.

Finally, the committee explored regulatory alternatives for reducing dolphin mortality in the ETP purse-seine fishery. The first set of options centers on regulatory alternatives that would further prohibit, directly or indirectly, dolphin mortality. These alternatives include prohibition of dolphin mortality and issuance of dolphin-mortality certificates.

The second set of options centers on alternatives that would create incentives for behavior that reduces dolphin mortality, as opposed to direct or indirect prohibition on dolphin mortality itself. These include incentives for tuna fishing with alternative gear, price incentives for fishing on non-dolphin-associated tuna, and the development of vessel-captain performance standards coordinated with a training and evaluation program.

RECOMMENDATIONS

The committee's recommendations are presented in two parts. The first part treats avenues for developing promising new techniques for reducing dolphin mortality in the existing purse-seine fishery on dolphins. The second part

treats research on and development of new methods of harvesting ETP yellowfin not in association with dolphins.

Recommendations Concerning the ETP Tuna-Dolphin Fishery

The committee judges that improvement in captain performance is the single most important step that can be taken to reduce dolphin mortality in the ETP purse-seine fishery. *Therefore, the committee recommends that an inter national meeting be convened of representatives of government and industry from all countries engaged in the ETP purse-seine fishery.* The purposes of this meeting would be the following:

1. Develop an educational certification and monitoring protocol for all captains in the international fleet.
2. Initiate research on the development of incentives to improve captain performance.

The committee recommends that two approaches, short term and long term, be undertaken in gear and methods research and development. These approaches are the following:

1. A number of small modifications of current methods could be built and tested immediately on commercial fishing trips. The most promising modifications are the current profiler, jet boat, double corkline, pear-shaped snap rings, and polyester net. The committee emphasizes that it is of paramount importance that an international program be developed to systematically deploy, test, and evaluate these modifications of current methods.
2. A number of major modifications of current methods need to be researched and developed on a long-term basis. These modifications include inflatable sections or partitions in the net, lifting surfaces, modified purse cable, new netting materials, and modified net

designs. The committee recommends a long-term engineering approach toward eliminating major causes of dolphin mortality in the purse-seine process-canopies, roll-ups, and collapses in the backdown channel.

Research is needed for a better understanding of the behavior of both dolphins and tuna and the bond between them. Details, costs, and potential benefits of many of the concepts delineated above cannot be judged at present.

Fishermen need both incentives and options to make further progress in reducing dolphin mortality. The individual fisherman alone cannot be expected to develop the options that offer significant improvements if they represent major changes to the present gear because fishermen who adopt gear that is likely to reduce dolphin mortality might incur economic losses. *The committee recommends that a program of research be established to develop options and to demonstrate them to the industry*. Such a program should include two facets:

1. An experimental research program of innovative gear to investigate performance and techniques. This program would have access to a modern commercial purse seiner as a dedicated vessel that would not be constrained by the normal pressures of tuna productivity. Because the capture of animals by fishing gear involves interactions between the animals and the gear, the research must include a program of behavioral studies focused on the reactions of both tuna and dolphins to fishing gear and other stimuli. Techniques would include underwater video observation by remote-operated vehicle and acoustic sensing and tracking. Most of the effort would be at sea with deployed gear.
2. The information gained from the research above would

then be used to develop rational purse-seine modifications and alternative harvesting methods based on the engineering requirements of the fishery. This focus would use analysis and modeling to develop, refine, and evaluate each concept to ensure a reasonable chance of success before it was attempted as a commercial prototype. After the analysis and modeling, promising prototypes would be field-tested.

The committee recommends that a program of research on the behavior of tuna and dolphins be established and that it have the following components:

1. Oceanographic correlates.
2. Simultaneous tracking of dolphins and associated yellowfin.
3. Tracking flotsam-associated yellowfin.
4. Studies using fish-aggregating devices (FADs).
5. Satellite monitoring of radio-tagged dolphins.

Recommendations for Research on Harvesting Tuna Not in Association with Dolphins

Even if harvest of yellowfin tuna in association with dolphins continues, the committee recommends that major research be undertaken to explore new methods of harvesting yellowfin not in association with dolphins in the ETP. The promising avenues of research identified by the committee are as follows:

1. Research into the night behavior of tuna and dolphins. If large yellowfin do not associate with dolphins at night, purse seining or trawling could be done at night, which would reduce dolphin mortality significantly.
2. Research into new methods of purse seining.

3. Research on existing FADs and new technologies such as submerged FADs, which may have a greater potential than surface FADs for attracting and holding commercially harvestable schools of large yellowfin tuna.
4. The use of satellite oceanographic techniques to locate aggregations of tuna not associated with dolphins in the ETP.
5. The use of alternative techniques of locating tuna that do not depend on the sighting of dolphins.
6. Assessment of the impact on tuna populations if purse seining for tuna in association with dolphins is discontinued.

(2)

Supreme Court, U.S.
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No. 03-915

In the Supreme Court of the United States

DEFENDERS OF WILDLIFE, ET AL., PETITIONERS

v.

WILLIAM T. HOGARTH, ASSISTANT ADMINISTRATOR, FISHERIES NATIONAL MARINE FISHERIES SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Commerce, in its interim-final rule implementing the International Dolphin Conservation Program Act, 16 U.S.C. 1413, acted within its statutory authority in adopting a requirement that fishing vessels, by 30 minutes after sundown, complete the backdown procedure for releasing dolphins captured in purse seine fishing nets.

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WILLIAM T. HOGARTH, ASSISTANT ADMINISTRATOR, FISHERIES NATIONAL MARINE FISHERIES SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 330 F.3d 1358. The opinion of the Court of International Trade (Pet. App. 35a-54a) is reported at 177 F. Supp. 2d 1336.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2003. A petition for rehearing was denied on September 25, 2003 (Pet. App. 55a-59a). The petition for a writ of certiorari was filed on December 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. a. In 1972, Congress enacted the Marine Mammal Protection Act of 1972 (MMPA), Pub. L. No. 92-522, 86 Stat. 1027 (16 U.S.C. 1361 *et seq.*). The principal purpose of the MMPA was to protect marine mammals by, *inter alia*, establishing a ban upon "the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." MMPA § 101(a)(2), 86 Stat. 1030 (16 U.S.C. 1371(a)(2)).

Congress amended the MMPA in 1984. See Act of July 17, 1984, Pub. L. No. 98-364, 98 Stat. 440. The amendments required governments of nations that export yellowfin tuna harvested in the "purse seine" fishery in the eastern tropical Pacific Ocean (ETP)[1] to provide documentary evidence that they have adopted a regulatory program governing the taking of marine mammals that is comparable to that of the United States and that the average rate of incidental taking of the harvesting nations is comparable to that of the

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[1] A "purse seine" is a type of commercial fishing net that is placed in the water around a school of fish. Once the net is lowered into the water, it hangs much like a curtain around the school. A drawstring around the bottom of the net is then closed, capturing the target fish, as well as any non-target species caught in the net. One strategy used by purse seine fishermen in the ETP is to deploy their nets around groups of dolphins because dolphins tend to swim above schools of tuna in that region. In the early 1970s, an estimated 350,000 dolphins were killed annually in the ETP purse seine fishery. By 1998, dolphin mortality was reduced to approximately 2000 per year. See generally *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding*, 64 Fed. Reg. 24,590 (1999); H.R. Rep. No. 74, 105th Cong., 1st Sess. Pt. 1, at 11-12 (1997).

United States. In 1988, Congress further amended the MMPA by specifying criteria that tuna harvesting nations must satisfy for their regulatory programs to be considered comparable to that of the United States. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, § 4, 102 Stat. 4765.

In 1990, Congress made it a violation of the Federal Trade Commission Act, 5 U.S.C. 41 *et seq.*, to label any tuna product as "dolphin-safe" if the product contains tuna harvested (i) upon the high seas by a vessel engaging in driftnet fishing, or (ii) in the ETP by a vessel using purse seines unless the product is accompanied by various statements demonstrating that no dolphin was intentionally encircled during the trip in which the tuna was caught. Dolphin Protection Consumer Information Act, Pub. L. No. 101-627, § 901, 104 Stat. 4465 (16 U.S.C. 1385).

In 1992, Congress amended the MMPA to: (1) impose a five-year moratorium upon the harvesting of tuna with purse seine nets deployed on or to encircle dolphins; and (2) lift the tuna embargo for those nations that made a declared commitment to implement the moratorium and take other steps to reduce dolphin mortality. International Dolphin Conservation Act of 1992 (IDCA), Pub. L. No. 102-523, 106 Stat. 3425. No nation issued a statement of intent to honor the provisions of the IDCA. H.R. Rep. No. 74, 105th Cong., 1st Sess. Pt. 1, at 14 (1997).

b. In June 1992, the United States and certain other nations entered into a non-binding agreement (the La Jolla Agreement) that set forth a wide range of undertakings to protect dolphins from harm in the ETP purse seine fishery, including a schedule for significant reductions in dolphin mortality. Pet. App. 141a-151a. In October 1995, the United States and eleven other

nations signed the Panama Declaration, which formalized, modified, and enhanced the La Jolla Agreement. The Panama Declaration contained statements of intent to establish an International Dolphin Conservation Program (IDCP). Pursuant to the Panama Declaration, other nations committed to strengthen the protection of dolphins and to negotiate a new binding agreement to establish an IDCP, but only if the United States amended its laws to: (1) lift the embargoes imposed under the MMPA; (2) permit the sale of both dolphin-safe and non-dolphin safe tuna in the U.S. market; and (3) change the definition of "dolphin-safe tuna" to mean "tuna harvested without dolphin mortality." *Id.* at 152a-161a.

c. In 1997, Congress enacted the International Dolphin Conservation Program Act (IDCPA), Pub. L. No. 105-42, 111 Stat. 1122. The three purposes of the IDCPA were to: (1) give effect to the intent of the Panama Declaration that the United States negotiate a binding agreement to establish the IDCP; (2) recognize that nations involved in the ETP tuna fishery have achieved significant reductions in dolphin mortality; and (3) end the ban on imports of tuna from nations that comply with the IDCP. IDCPA § 2, 111 Stat. 1122. The IDCPA directed the Secretary of State, in consultation with the Secretary of Commerce, to "seek to secure a binding international agreement to establish an International Dolphin Conservation Program." 16 U.S.C. 1412. The IDCPA also amended the MMPA to permit a nation to export tuna to the United States if the nation provides documentary evidence that it: (1) participates in the IDCP and is a member (or applicant member) of the Inter-American Tropical Tuna Commission; (2) is meeting its obligations under the IDCP and the Inter-American Tropical Tuna Commission; and (3) does not

exceed certain dolphin mortality limits. 16 U.S.C. 1371(a)(2)(B).

The IDCPA gave the Secretary of Commerce authority to "issue regulations, and revise those regulations as may be appropriate, to implement the International Dolphin Conservation Program," 16 U.S.C. 1413(a)(1), including "regulations to authorize and govern the taking of marine mammals in the eastern tropical Pacific Ocean * * * by vessels of the United States," 16 U.S.C. 1413(a)(2)(A). The IDCPA prescribes that the regulations include a number of specific provisions, 16 U.S.C. 1413(a)(2)(B), including a provision "ensuring that the backdown procedure during sets of purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes before sundown," 16 U.S.C. 1413(a)(2)(B)(v).[2] The IDCPA also provides the Secretary with regulatory authority to adjust the requirements contained in 16 U.S.C. 1413(a)(2)(B) in accordance with the IDCP that is established through the binding international agreement that Congress directed be negotiated: "[t]he Secretary may make such adjustments as may be appropriate to requirements of subparagraph (B) that pertain to fishing gear, vessel equipment, and fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program." 16 U.S.C. 1413(a)(2)(C).

The IDCPA became effective on the date that the Secretary of State certified that a binding instrument

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[2] "'Backdown' means the procedure for releasing captured dolphins by shifting the vessel's engine(s) into reverse during net retrieval, causing the net remaining in the water to form a channel, and the corkline at the apex of the channel to submerge." Agreement on the International Dolphin Conservation Program, Annex VIII.1.b (Pet. App. 205a).

establishing the IDCP has been adopted. Pub. L. No. 105-42, § 8, 111 Stat. 1139. "The Agreement on the IDCP became effective on February 15, 1999, after four nations (United States, Panama, Ecuador, and Mexico) deposited their instruments of ratification, acceptance, or adherence with the depository for the agreement." *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP)*, 65 Fed. Reg. 30, 31 (2000) (*Interim-Final Rule*). The Agreement on the IDCP provided, *inter alia*, that covered vessels shall "[c]omplete backdown no later than thirty minutes after sunset." Agreement on the International Dolphin Conservation Program, Annex VIII.3.e (Pet. App. 207a).

d. On June 14, 1999, the Department of Commerce published a proposed rule implementing the IDCPA. *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP)*, 64 Fed. Reg. 31,806 (1999). On January 3, 2000, after receiving and considering numerous comments, the Department issued the *Interim-Final Rule*, 65 Fed. Reg. at 30 (Pet. App. 92a-140a). In accordance with the agreement establishing the IDCP, the *Interim-Final Rule* prescribes that covered vessels complete "the backdown procedure" for purse seine nets "no later than one-half hour after sundown." 50 C.F.R. 216.24(c)(6)(iii) (Pet. App. 105a).

2. On February 8, 2000, petitioners filed an action in the Court of International Trade alleging that the *Interim-Final Rule* was contrary to the terms of the IDCPA. Pet. App. 9a. Petitioners argued, *inter alia*, that because the IDCPA states that the regulations shall "ensure[] that the backdown procedure during

sets of purse seine net * * * is completed * * * no later than 30 minutes *before* sundown," 16 U.S.C. 1413(a)(2)(B)(v) (emphasis added), the *Interim-Final Rule* was contrary to the IDCPA in providing that "the backdown procedure must be completed no later than one-half hour *after* sundown." Pet. App. 105a (emphasis added).

On December 7, 2001, the Court of International Trade issued a decision denying petitioners' claims. Pet. App. 35a-54a. In rejecting petitioners' challenge to the time for completing sundown sets, the court explained that "the IDCPA is a culmination of a quarter-century of legislative and administrative action, not legislation written on a blank slate." *Id.* at 50a. The court further explained that, "the relationship between the [IDCPA] and the [IDCP] inverts the traditional chronological order. Most international agreements receive congressional approval and implementing authority *after* they have been negotiated." *Ibid.* In contrast, "[t]he IDCPA gave *standing authority* to the executive branch to negotiate an international agreement and to issue regulations to implement the agreement, *without returning to Congress* for authorization." *Ibid.* The court concluded that, when the statutory "language is placed in the context of twenty-five years of legislative enactments and enforcement," the "congressional intent is clear" to "use the word 'after,' rather than 'before,' to establish the cut-off period for sundown sets." *Id.* at 52a.

3. The court of appeals affirmed. Pet. App. 1a-34a. The court did not rely on the conclusion of the Court of International Trade that Congress had mistakenly used the word "before" rather than "after." *Id.* at 16a. The court instead relied on the Secretary's authority under the IDCPA to "make such adjustments as may be

appropriate to requirements of subparagraph (B) that pertain to fishing gear, vessel equipment, and fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program." 16 U.S.C. 1413(a)(2)(C); see Pet. App. 16a-17a. The court explained that the National Marine Fisheries Service (NMFS) of the Department of Commerce "was authorized to alter the backdown procedure in the IDCPA" because the "period for permissible sundown sets is a fishing practice subject to section 1413(a)(2)(C)." *Id.* at 17a. The court further reasoned that "the International Agreement creating the IDCP states that the backdown procedure must be completed no later than one half hour after sunset," and that, pursuant to the terms of the statute, "NMFS was authorized to draft the Interim-Final Rule in a manner consistent with the IDCP." *Ibid.*

The court rejected petitioners' argument that, under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), the Secretary was barred from relying on Section 1413(a)(2)(C) because the *Interim-Final Rule* had not specifically relied on that provision. Pet. App. 17a-18a. The court explained that NMFS, in response to comments, had "relied on the International Agreement creating the IDCP as support for the Interim-Final Rule and relied on the fact that the Interim-Final Rule is consistent with the International Agreement." *Id.* at 18a. The court further explained that, unlike in *Chenery*, the court was not required to make any factual findings in the first instance, but instead was "called upon to determine whether NMFS had the authority under [Section 1413(a)(2)(C)] to issue the Interim-Final Rule as drafted." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is unwarranted.

1. a. The IDCPA directs the Secretary of State, in consultation with the Secretary of Commerce, to "seek to secure a binding international agreement to establish an International Dolphin Conservation Program." 16 U.S.C. 1412. Although Congress required that regulations implementing the IDCP include certain provisions —including one ensuring that the backdown procedure for purse seine nets must be completed "no later than 30 minutes before sundown," 16 U.S.C. 1413(a)(2)(B)(v) —Congress made clear that the Secretary of Commerce had authority to adjust those requirements insofar as would be consistent with the terms of the IDCP to be established by international agreement: "The Secretary may make such adjustments as may be appropriate to requirements of subparagraph (B) that pertain to fishing gear, vessel equipment, and fishing practices to the extent the adjustments are consistent with the [IDCP]," 16 U.S.C. 1413(a)(2)(C). To the same effect, in granting the Secretary authority to "issue regulations," the IDCPA provides that the Secretary "shall * * * revise those regulations as may be appropriate, to implement the [IDCP]." 16 U.S.C. 1413(a)(1).

The international agreement establishing the IDCP provides that covered vessels shall "[c]omplete backdown no later than thirty minutes after sunset." Pet. App. 207a. Petitioners do not dispute the court of appeals' conclusion that the time for completing the backdown procedure constitutes a "fishing practice" within the meaning of Section 1413(a)(2)(C). *Id.* at 17a. As a

result, the Secretary has authority under the plain terms of Section 1413(a)(2)(C) to conform the implementing regulations to the "thirty minutes after sunset" standard established in the IDCP. *Id.* at 207a.

b. There is no merit to petitioners' reliance (Pet. 12-14) on the interpretive canon that specific statutory language governs over more general language. Here, the ostensibly "general" language in Section 1413(a)(2)(C) in fact specifically and explicitly authorizes the Secretary to make adjustments to the "requirements" of 16 U.S.C. 1413(a)(2)(B), which include the requirement concerning the time for completing the backdown procedure for purse seine nets. Indeed, it is petitioners' construction of the statute that fails to "give effect to every clause and word of the statute" (Pet. 12), by disregarding the statute's grant of authority to negotiate a binding international agreement establishing an IDCP and to make adjustments harmonizing the regulations with the provisions of any agreement reached. None of the decisions on which petitioners rely (Pet. 12-14) involved a comparable grant of specific statutory authority.

Petitioners' reliance (Pet. 17) on *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), and *Motor Vehicles Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), is misplaced. This Court has held that an agency need not cite the exact source of its authority to act if its authority is clear from the statute. In *Massachusetts Trustees* v. *United States*, 377 U.S. 235 (1964), the Court sustained a provision adopted by the Maritime Commission even though the agency had cited the wrong statute as its authority. The Court rejected a challenge based on *SEC* v. *Chenery*, *supra*, explaining that "the Commission's failure to indicate explicitly or implicitly that [the correct] section

was the source of its power is without legal significance." 377 U.S. at 248.

2. Contrary to petitioner's argument (Pet. 17-20), Congress's grant of authority to the Secretary to make adjustments to regulatory requirements does not infringe the Presentment Clause. Congress possesses the authority to direct an agency to conduct negotiations with foreign countries in the hope of reaching an agreement concerning issues within the agency's regulatory authority. U.S. Const. Art. I. § 8, Cl. 3 (Congress possesses power to "regulate Commerce with foreign Nations"). Congress therefore also possesses the authority to grant the agency regulatory authority to adopt regulations reflecting the terms of any agreement reached. This Court has explained that the lawmaking procedures required by the Presentment Clause are "not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *INS* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983). Here, "the limits of the statute that created" the authority to issue the *Interim-Final Rule* are set forth in 16 U.S.C. 1413(a)(2)(C), and they specifically allow the Secretary to make adjustments consistent with any international agreement ultimately reached on an IDCP.

In *Field* v. *Clark*, 143 U.S. 649 (1892), importers challenged the constitutionality of a section of the Tariff Act of 1890 that authorized the President to "suspend" the Act's provisions (thereby raising tariffs) if the President determined that foreign governments were imposing "reciprocally unequal and unreasonable" tariffs upon certain commodities. The importers argued that the suspension provision unconstitutionally dele-

gated lawmaking power to the President. *Id.* at 681. This Court rejected that argument, observing that the President's power to suspend the provisions of the Tariff Act "was a part of the law itself as it left the hands of Congress," and that "[t]he true [constitutional] distinction * * * is between the delegation of power to make the law * * * and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Id.* at 693-694 (citation and internal quotation marks omitted). In this case, the authority to issue regulations upon reaching an agreement with other nations involved in the ETP tuna fishery likewise was "a part of the law itself as it left the hands of Congress." *Id.* at 693.

Petitioners err in relying (Pet. 17-20) on *Clinton* v. *New York*, 524 U.S. 417 (1998). In that case, the Court concluded that the Line Item Veto Act of 1996, 2 U.S.C. 691 *et seq.*, violated the Presentment Clause. The "decision rest[ed] on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution" because the Act "would authorize the President to create" a law "whose text was not voted on by either House of Congress or presented to the President for signature." *Id.* at 448. The Court distinguished the Tariff Act at issue in *Field* on several grounds, including that "the exercise of the suspension power [under the Tariff Act] was contingent upon a condition that did not exist when the Tariff Act was passed," *id.* at 443, and that "whenever the President suspended an exemption under the Tariff Act, he was executing the policy that Congress had embodied in the statute," *id.* at 444. Here, likewise, the contingency that allowed the Secretary to adjust the sundown rule was the signing of the agreement on the IDCP two years after the passage of the IDCPA, and Congress

intended that the Executive reach an international agreement with other nations involved in the ETP tuna fishery and that the implementing regulations reflect the terms of that agreement. See, *e.g.*, IDCPA § 8, 111 Stat. 1139 (declaring IDCPA effective upon entry into a legally binding agreement); H.R. Rep. No. 74, 105th Cong., 1st Sess. Pt. 2, at 5 (1997) (stating sense of Congress "that enforcement actions are often the most effective when they are based on international consensus, and that such consensus would be more constructive to effective management of the ETP tuna fishery by all countries concerned"). See also 16 U.S.C. 1378(a)(2)(B), 1412.[3]

The IDCPA therefore does not allow the Executive Branch to effect the repeal of laws in contravention of the procedures required by the Presentment Clause. Rather, the IDCPA "confer[s] authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Field*, 143 U.S. at 694 (citation omitted). That conclusion is reinforced by the Court's recognition

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[3] The Court observed in *Clinton* v. *New York* that, under the Tariff Act upheld in *Field*, "when the President determined that the contingency had arisen, he had a duty to suspend." 524 U.S. at 443. In this case, while the Secretary has discretion to promulgate "appropriate" adjustments consistent with the Agreement on the IDCP, Congress mandated that the Secretary of Commerce "initiate * * * discussions with foreign governments" involved in the ETP tuna fishery, 16 U.S.C. 1378(a)(2)(B), and that the Secretary of State, in consultation with the Secretary of Commerce, "shall seek to secure a binding international agreement to establish an International Dolphin Conservation Program," 16 U.S.C. 1412. Congress's direction to attempt to negotiate a *binding* agreement entailed an obligation to implement the agreement through consistent regulations. See 16 U.S.C. 1413(a)(1) ("The Secretary *shall* issue regulations, and *revise those regulations as may be appropriate*, to implement the [IDCP].") (emphasis added).

in *Clinton* v. *New York* that the Executive, in implementing statutes that concern foreign affairs, possesses "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." 524 U.S. at 445 (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). Here, the purpose of the IDCPA is to develop rules governing international trade in tuna caught in the ETP purse seine fishery and to foster international cooperation in protecting stocks of highly migratory marine mammals on the high seas. Accordingly, issuance of regulations "consistent with the International Dolphin Conservation Program" (16 U.S.C. 1413(a)(2)(B)) is a permissible exercise of the Executive Branch's discretion in foreign affairs.

3. Contrary to petitioners' assertion (Pet. 23-24), the court of appeals' decision does not conflict with *United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955), or *Swearingen* v. *United States*, 565 F. Supp. 1019 (D. Colo. 1983). In both cases, the courts declined to enforce the provisions of an international agreement on the ground that it was contrary to statutes enacted by Congress. Neither case involved a statute that itself granted authority to enter into an international agreement or to conform regulatory requirements to the terms of any such agreement. In this case, by contrast, the IDCPA directed the Executive to attempt to negotiate a binding international agreement establishing an IDCP and granted regulatory authority to the Secretary to adjust the sundown set rule and other requirements to conform to any agreement reached.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DEFENDERS OF WILDLIFE ET AL.,
PETITIONERS

v.

WILLIAM T. HOGARTH,
ASSISTANT ADMINISTRATOR FOR FISHERIES,
US NATIONAL MARINE FISHERIES SERVICE, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS
IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI

Respondents, William T. Hogarth, et al., federal administrative agencies directed by Congress to implement the U.S. dolphin-safe tuna program, contend that these agencies acted within their "statutory authority in adopting a requirement that fishing vessels, by 30 minutes *after* sundown, complete the backdown procedure for releasing dolphins captured in purse seine fishing nets." Respondents' Question Presented (emphasis added). Even under respondents' narrowed construction of the case, which remarkably does not dispute the "30 minutes *before* sundown" Congressional mandate, Pet. App. 77a at (B)(v), serious constitutional issues are raised by their blatant departure from both the plain language and overall intent of the U.S. Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1413(a)(2)(A)-(B)(v), 1361, as amended. But see 50 C.F.R. 216.24(c)(6)(iii) (Pet. App. 105a).

Respondents rely upon and represent that it "may be appropriate," under 16 U.S.C. § 1413 (a)(2)(C), for them to change a congressional conservation mandate that is part of the same provision within the same statute. Respondents' Brief at 9-10. But Congress "does not, one might say, hide elephants in mouseholes." Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 468 (2001) (upholding prohibition against considering costs in setting air quality standards despite, inter alia, agency authority to make revisions "as may be appropriate" under 42 U.S.C. § 7409(d)(1)). "Appropriate" under any definition means that which is "suitable or compatible" or "fitting." See, e.g., Webster's New Collegiate Dictionary (1981). It defies all reason, and precedent of this Court, that harmful sundown sets on dolphins could be administratively "appropriate" in light of the specific congressional prohibition *against*

sundown sets. 16 U.S.C. § 1413(a)(2)(B)(v).[1] The clearly correct legal reading of this statute necessitates saving the sundown set provision, "rather than to emasculate an entire section, as the Government's interpretation requires." United States v. Menasche, 348 U.S. 528, 539 (1955).

Petitioners urge the Court to consider three fundamental problems with respondents' argument that federal agencies can now unilaterally re-write congressional mandates when they deem it "appropriate":

First, respondents ignore not only the specific congressional mandate at issue, which applies only to U.S. vessels and could not be clearer, 16 U.S.C. § 1413(a)(2)(A)–(B)(v), but also the purposes of the 1997 amendments to the MMPA, Pet. App. 61a – 91a. The two international agreements preceding the 1997 International Dolphin Conservation Program Act (IDCPA), *as well as the IDCPA itself*, expressly committed U.S. vessels to an objective of "progressively reducing dolphin mortality" to a level "approaching zero" and the "goal of eliminating dolphin mortality." See IDCPA, § 2(b)(4), Pet. App. 62a-63a; Declaration of Panama, Pet. App. 152a; La Jolla Agreement, Pet. App. 141a.

More importantly, the statutory mandate to *ensure* that the backdown procedure begin no more than "30 minutes *before sundown*" cannot be overridden by a concomitant authority to make "adjustments to requirements," to technical "fishing practices" "as may be appropriate." See 16 U.S.C. § 1413(a)(2)(B)-(C) (Pet. App. 76a-80a; IDCPA § 303). An examination of the regulations contemplated by 16 U.S.C. § 1413(a)(2)(B) (Pet. App. 77a-78a; IDCPA § 303(a)(2)(B)) – including all twelve of the subsections thereafter listed – demonstrates that "ensuring" no sundown sets by U.S. vessels is quite analogous to

[1] See also 16 U.S.C. § 1374(b)(2)(D) (marine mammal take permits shall include certain mandates and "any other terms or conditions which the Secretary deems *appropriate*") (emphasis added).

"banning" the "use of explosive devices" during fishing operations under 16 U.S.C. § 1413 (a)(2)(B)(vi), rather than, "requiring the use of special equipment" under 16 U.S.C. § 1413 (a)(2)(B)(iv) (emphasis added to term also used in subsection (a)(2)(C)). Put another way, an administrative abrogation of the exact statutory language in 16 U.S.C. § 1413 (a)(2)(B)(v) simply cannot be reconciled with the limited authority granted by 16 U.S.C. § 1413 (a)(2)(C).[2] Congress would not and could not prohibit sundown sets by then affirmatively authorizing such harmful such sets for U.S. vessels through an "adjustments to requirements" section that is much less definitive and specific than the statutory sundown set provision in question. Id.

Second, respondents cannot escape their Article VI and Presentment Clause problems. See, e.g., Respondents' Brief at 11. ("Congress therefore also possesses the authority to grant the agency regulatory authority to *adopt regulations reflecting the terms of any agreement reached.*") (emphasis added). Thus, here, the "contingency" upon which respondents rely – the non-Treaty international agreement – is no more lawful than the President's line-item altering of Congressional will and action in Clinton v. New York, 524 U.S. 417 (1998). The international agreement's conflicting provision on backdown procedure timing, negotiated and adopted for foreign vessels by the State Department, is certainly far different than the contingency of foreign tariffs expressly delegated to the President in Field v. Clark, 143 U.S. 649 (1892). Respondents can point to no authority for the proposition that Congress' intent was to overturn a strict conservation procedure, the backdown procedure described at Respondents' Brief at 5, fn.2, particularly when the "International Dolphin Conservation Program" defined by the statute explicitly

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[2] Further, three of the impacted stocks of dolphins are "depleted" under the MMPA, triggering increased protection for them. See, e.g., MMPA, 16 U.S.C. §§ 1362, 1413(a)(2)(A).

references two earlier international agreements that had no language at all on sundown sets. Pet. App. 63a (16 U.S.C. § 1362)), 76a (16 U.S.C. § 1413(a)(1)). See also Appendices G and H (Pet. App. 141a -161a).[3]

Third, respondents' violation of the administrative procedural canons, emboldened in S.E.C. v. Chenery, 318 U.S. 80 (1943) and Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), directly led to the constitutional and statutory issues raised by this petition for a writ of certiorari. Thus, petitioners most certainly *do* dispute "the court of appeals' conclusion that the time for completing the backdown procedure constitutes a 'fishing practice' within the meaning of Section 1413(a)(2)(C)." But see Respondents' Brief at 9. Throughout this litigation, petitioners have regarded the sundown set provision as a "conservation mandate or procedure," not an "adjustment to a technical requirement." Respondents themselves, who have *never* defined "fishing practices" in this regulatory regime, Pet. App. at 92a – 140a, do not deny that effectively lifting the ban on sundown sets is *significantly* more harmful to the three depleted populations of dolphin (and all dolphin populations) than sets completed by the statutorily proscribed 30 minutes *before sundown*. Pet. App. 213a, 225a. Respondents also admit, contrary to the federal government's earlier explanation, that the statutory provision in question was *not* "a drafting error." Compare Pet. App. 93a (Federal Register final rule comment) with Respondents' Brief at 7-9. Once the excuse of congressional mistake is properly discarded, this Court is left with nothing but an unaccountable agency departure from a highly deliberate policy choice by

[3] Similarly, in United States v. Shimer, it was held that a veteran must compensate the federal government agency guarantor under federal law despite the existence of compelling state law on the matter. 367 U.S. 374 (1961).

Congress. Agencies must follow legislative mandates, not create them by administrative fiat.

CONCLUSION

The petition for writ of certiorari should be granted for the compelling and significant reasons so stated.

Respectfully submitted,

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